***United States Court of Appeals***

***for the Second Circuit***

# AMICUS BRIEF

77-7237 ORIGINAL

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

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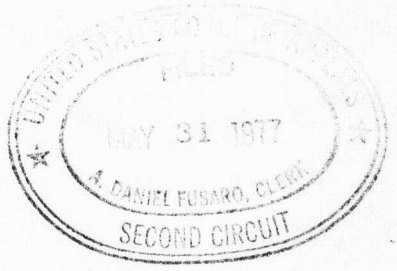
| THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY; WILLIAM J. RONAN; W. PAUL STILLMAN; JAMES G. HELLMUTH; VICTOR R. YANITELLI; MILTON A. GILBERT; JAMES C. KELLOGG, III; ALAN SANGER; JOSEPH F. CULLMAN, III; JANE ENGELHARDT; LEWIS L. GLUCKSMAN; ROBERT F. WAGNER; COMMISSIONERS OF THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY, and HOWARD SCHULMAN, COMMISSIONER DESIGNATE OF THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY,<br><br>Defendants and Appellants,<br><br>v.<br><br>BRITISH AIRWAYS BOARD AND COMPAGNIE NATIONALE AIR FRANCE,<br><br>Plaintiffs and Appellees. | No. 77-7237 |




APPLICATION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF OF THE STATE OF CALIFORNIA IN SUPPORT OF APPELLANTS' PORT AUTHORITY OF NEW YORK AND NEW JERSEY ET AL.

EVELLE J. YOUNGER, Attorney General
of the State of California
LARRY C. KING,
Deputy Attorney General
555 Capitol Mall, Suite 350
Sacramento, California 95814
Telephone: (916) 445-2357

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

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| THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY; WILLIAM J. RONAN; W. PAUL STILLMAN; JAMES G. HELLMUTH; VICTOR R. YANITELLI; MILTON A. GILBERT; JAMES C. KELLOGG, III; ALAN SANGER; JOSEPH F. CULLMAN, III; JANE ENGELHARDT; LEWIS L. GLUCKSMAN; ROBERT F. WAGNER; COMMISSIONERS OF THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY, and HOWARD SCHULMAN, COMMISSIONER DESIGNATE OF THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY,<br><br>Defendants and Appellants,<br><br>v.<br><br>BRITISH AIRWAYS BOARD AND COMPAGNIE NATIONALE AIR FRANCE,<br><br>Plaintiffs and Appellees. | No. 77-7237<br><br>APPLICATION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF THE STATE OF CALIFORNIA IN SUPPORT OF APPELLANTS PORT AUTHORITY OF NEW YORK AND NEW JERSEY ET AL.<br><br>AND<br><br>BRIEF AMICUS CURIAE OF THE STATE OF CALIFORNIA |

TO: THE HONORABLE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The State of California acting by and through its Department of Transportation filed an extensive brief amicus curiae in the Court below. The State of California respectively requests permission of this Court to file its brief amicus curiae in support of appellants Port Authority of New York and New Jersey et al.

1. Rule 29 of the Federal Rules of Appellate Procedure provides that a state need not secure consent of the parties to obtain leave of Court to file a brief amicus curiae, but that any such brief must be filed within the time allowed the party whose position such brief will support.

2. Due to the limited time available to prepare a brief for this expedited appeal, the State of California has been unable to prepare a separate amicus curiae brief specifically addressing the decision of the court below.

3. The State of California is extremely concerned with the issue presented in this appeal - the authority of an airport proprietor to control noise around its airport by controlling the conditions of use of that airport. The brief of the State of California in the court below extensively addressed the legislative history and case law supporting the authority of an airport proprietor to control the use of its airport. The decision of the court below fails to discuss the pertinent statutory and case law involving an issue of nationwide importance. For these reasons, the State of California respectively requests this Court to accept and consider its brief amicus curiae filed in the district court as a brief in this appeal.

4. For the convenience of this Court and the parties, the State of California has reproduced the most relevant parts of its court brief and has attached it to this consolidated application and brief.

WHEREFORE, the State of California respectively requests leave to file the attached brief amicus curiae.

DATED: May 26, 1977.

EVELLE J. YOUNGER, Attorney General
of the State of California

LARRY C. KING,
Deputy Attorney General

Attorneys for State of California
Department of Transportation

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

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BRIEF AMICUS CURIAE

EVELLE J. YOUNGER, Attorney General
of the State of California
LARRY C. KING,
Deputy Attorney General
555 Capitol Mall, Suite 350
Sacramento, California 95814
Telephone: (916) 445-2357

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

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## INTRODUCTION

The State of California by and through its Department of Transportation respectfully submits the attached brief as amicus curiae. The State of California is extremely concerned that its airport proprietors have the authority to deal with the noise problems created by the operation of their airports. The court below in its decision failed to consider the statutory

and case law discussed in this brief. Furthermore, the decision of the court below is in direct conflict with two district court cases in the State of California, Air Transport Association of America v. Crotti, 389 F.Supp. (No. District California 1975) and National Aviation v. City of Hayward, California, 418 F.Supp. 417 (No. District of California 1976).

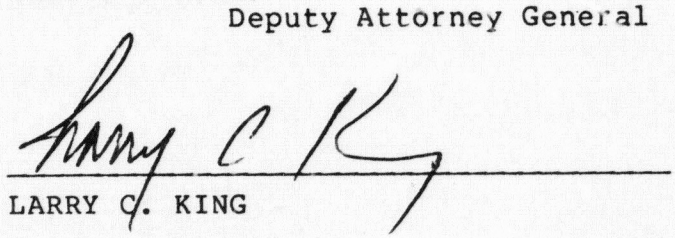
For the reasons set forth in the State of California's brief amicus curiae we respectfully submit that the court below erred in its determination that the federal government has totally preempted the ability of an airport proprietor to impose restrictions on the use of its airport. The court furthermore erred in its view that the airport proprietor has only those powers delegated to it based on the policy of the Federal Aviation Administration. As the attached brief demonstrates Congress has protected the authority of an airport proprietor to control the use of its airport in order to limit its liability. Legislative history and case law support this authority of an airport proprietor. The court below clearly erred in its interpretation of existing federal law.

For the reasons set forth in these briefs State of California respectfully requests that the decision of the court below granting summary judgment be reversed and that this court declare that appellants Port Authority of New

York and New Jersey et al. are not preempted from the exercise of control over its airport.

Respectfully submitted,

EVELLE J. YOUNGER, Attorney General
of the State of California
LARRY C. KING,
Deputy Attorney General



LARRY C. KING

EVELLE J. YOUNGER, Attorney General
of the State of California
NICHOLAS C. YOST
Deputy Attorney General
6000 State Building
San Francisco, California 94102
Telephone: (415) 557-2204

Attorneys for State of California,
Department of Transportation

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

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| BRITISH AIRWAYS BOARD and COMPAGNIE NATIONALE AIR FRANCE,<br><br>Plaintiffs,<br><br>v.<br><br>THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY, WILLIAM J. RONAN, W. PAUL STILLMAN, JAMES G. HELLMUTH, VICTOR R. RANITELLI, ANDREW C. AXTELL, GEORGE F. BERLINGER, MILTON A. GILBERT, ROBERT R. DOUGLASS, JAMES C. KELLOGG, III, GUSTAV L. LEVY, MATTHEW NIMETZ, ALAN SANGER, Commissioners of the Port Authority of New York and New Jersey,<br><br>Defendants. | NO. CIV. 1276 (MP)<br><br>BRIEF AMICUS CURIAE OF THE STATE OF CALIFORNIA IN SUPPORT OF THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY |

INDEX


INTEREST OF AMICUS 2

ARGUMENT 2

I. INTRODUCTION 2

II. AMERICAN LAW PROVIDES THAT THE AIRPORT PROPRIETOR HAS THE AUTHORITY TO EXCLUDE AIRCRAFT BASED ON NOISE CONSIDERATIONS 3

A. The Critical Case—Griggs v. Allegheny County 3

B. All Three Branches of Government Continue to Recognize the Authority of the Airport Proprietor 5

1. The Congress Continues to Recognize the Authority of the Airport Proprietor 5

a. 1963 - The "Harris Committee" Report and the Status of the Law 5

b. 1968 Amendments to the Federal Aviation Act 9

i. Scope of the 1968 Act 9

ii. Preemption Under the 1968 Act 11

iii. Regulations Under the 1968 Act 13

c. 1970 - Airport and Airways Development Act 15

d. 1970 - Noise Pollution and Abatement Act 16

e. 1972 - Noise Control Act 16

i. The Scheme of the Noise Control Act 16

ii. Aviation Noise and the Noise Control Act 18

2. The Responsible Administrative Officials Continue to Recognize The Authority of The Airport Proprietor 24

3. The Courts Continue to Recognize The Authority of The Airport Proprietor 28

a. United States Supreme Court 28

b. Court of Appeal 29

c. District Courts 30

i. Air Transport Association v. Crotti 30

ii. National Aviation v. City of Hayward 37

III. THE EXISTING SYSTEM OF AIRPORT REGULATION IS IN FACT ONE OF "PERVASIVE DIVERSITY," NECESSITATED BY THE REQUIREMENTS OF INDIVIDUAL AIRPORTS AND THEIR SURROUNDING COMMUNITIES

A. Airport and Surrounding Land Use Management, Unlike Airspace Management, Is and Must Be One of "Pervasive Diversity" 38

B. The Actual Practice of Airports Is One of Noise Limitations Attuned to The Requirements of Individual Airports 40

CONCLUSION 42

## TABLE OF AUTHORITIES CITED


| CASES | PAGES |
|---|---|
| Air Transport Association, et al., v. Crotti, et al. 389 F.Supp. 58 (1975) | 2, 3, 12, 27, 28, 30, 31, 32, 33, 34, 35, 36 |
| Aircraft Owners and Pilots Association v. Port Authority of New York 305 F.Supp. 93 (E.D.N.Y. 1969) | 30 |
| City of Burbank v. Lockheed Air Terminal, Inc. 411 U.S. 624, 635-636 93 S.Ct. 1854, 1861 (1973) | 3, 18, 20, 24, 28, 29, 32, 33, 37, 38, 39 |
| Cooley v. Board of Wardens 12 How. 299 (1851) | 38, 39 |
| Griggs v. Allegheny County 369 U.S. 84, 82 S.Ct 531, 7 L.Ed2d 585 (1962) | 3, 5, 24, 25, 29, 41, 42 |
| Head v. Board of Examiners 374 U.S. 424, 443-444 (1963) | 21 |
| Hesse v. Rath 164 N.E. 324 (Ct. of App. N.Y. 1928) | 39 |
| Inglewood v. City of Los Angeles 451 F.2d 948, 955, n.14 (9th Cir. 1972) | 15 |
| Lockheed Air Terminal, Inc. v. City of Burbank 457 F.2d 667 (9th Cir. 1972), aff'd. 441 U.S. 624 (1973) | 24, 25, 29 |
| Loma Portal Civic Club v. American Airlines, Inc. 61 Cal.2d 582, 39 Cal.Rptr. 708, 394 P.2d 548 (Cal. S.C. 1964) | 21 |
| National Aviation, et al, v. City of Hayward ___F.Supp. ___ (N.D. Cal. No. C-75-2279 RFP slip opinion dated July 13, 1976) | 4, 28, 30, 37, 38, 41 |
| Opinion of the Justices 359 Mass. 778, 271 N.E.2d (1971) | 36 |


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Port of New York Authority v. Eastern Airlines, Inc.
259 F.Supp. 745 (E.D.N.Y. 1966) 30

Sioux Tribe v. United States
316 U.S. 317, 329-330 (1942) 6

Spokane and Inland Empire RR Co. v. United States
241 U.S. 344, 350 (1916) 17

Stagg v. Municipal Court
2 Cal. App. 3d 318, 82 Cal. Rptr. 578 (1969) 29

Wichita v. Clapp
263 Pac. 12, 15 (S.C. Kans. 1928) 39

STATUTES AND REGULATIONS

42 U.S.C. § 1506 21
1850(a), (b) 16
1857(b)(1), 1857c-4(b) 19
1857f-11 21
1858 et seq. 16
4901(a)(3) 17, 19
4901-4918 21
4902(3) 18
4902(11) 16
4905(e) 18
4906 40
4907 19
4916(c) 18
4917 18

49 U.S.C. § 1301 et seq. 5
1431 9, 19, 20, 21
1718 15

25 Fed. Reg. 1764-1767, March 1, 1960 24

34 Fed. Reg. 457, Jan. 11, 1969 26
18355 et seq., Nov. 18, 1969 13, 26, 27

38 Fed. Reg. 8051, March 28, 1973 22, 23
29573, October 26, 1973 14, 23

Pub. L. 90-41, 82 Stat. 395 9

P.L. 88-280, §10(1), 75 Stat. 161 15

/

14 C.F.R. Part 36 13

14 C.F.R. § 36.5 14
36.1581 14

14 C.F.R. 91.87 23

118 Cong. Rec. H. 1523-1527
(Daily ed., Feb. 29, 1972) 21

118 Cong. Rec. H. 1534
(Daily ed., Feb. 29, 1972) 22

118 Cong. Rec. H. 10295-10300
(Daily ed., Oct. 18, 1972) 21

118 Cong. Rec. S. 17752
(Daily ed., Oct. 12, 1972) 17

118 Cong. Rec. S. 17749
(Daily ed., Oct. 12, 1972) 21

118 Cong. Rec. S. 17989
(Daily ed., Oct. 13, 1972) 21

118 Cong. Rec. S. 18013
(Daily ed., Oct. 13, 1972) 21

MISCELLANEOUS

Federal Aviation Agency Act
85th Cong., 2d Sess., at 179, 184-185 5

Hearings Before the Subcommittee on Transportation and Aeronautics of the House Committee on Interstate and Foreign Commerce on H.R. 3400 and H.R. 14146, 90th Cong., 1st and 2nd Sess., at 87 11, 25

Improving the Airport Environment: Effect of the 1969 FAA Regulations on Noise, Larsen
55 Iowa L. Rev. 808, 814 (1970) 10, 13, 14

Legal and Institutional Analysis, at 2-38
U. S. Environmental Protection Agency 19

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Legal and Institutional Analysis of Aircraft and Airport Noise and Apportionment of Authority Between Federal, State and Local Governments (1973) U. S. Environmental Protection Agency 40

Legal and Institutional Analysis, Appendix B, Formal Recommendations of Task Group Member Organizations, Air Transport Association Formal Position, p. 7 U. S. Environmental Protection Agency 40

Mercury's Children in the Urban Trap: Community Planning and Federal Regulation of the Jet Noise Source 3 Urban Lawyer 206, 211 5 6, 7, 8, 15

"Noise Litigation at Public Airports" in Alleviation of Jet Aircraft Noise, Lyman M. Tondel, Jr., U. S. Office of Science and Technology, March, 1966, 119 40

Report on Aircraft-Airport Noise (1973) U. S. Environmental Protection Agency 23, 24, 40

The Report to the President and Congress on Noise, December 31, 1971 (NRC 500.1) U. S. Environmental Protection Agency 16

H.Rep. No. 36, 88th Cong., 1st Sess. Investigation and Study of Aircraft Noise Problems (1963) 5, 6, 7

H.R. Rep. No. 1463, 90th Cong., 2d Sess., at 4 9, 10, 13

H.R. Rep. No. 92-842, 92nd Cong., 2d Sess. (1972) 4-5 16, 18

S. Rep. No. 1353, 90th Cong. 2d Sess. U. S. Code Song. and Adminis. News, 2690 9, 10, 11, 12, 34

S. Rep. No. 92-1160, 92nd Cong., 2d Sess. (1972) 2 16, 17, 18

EVELLE J. YOUNGER, Attorney General
of the State of California
NICHOLAS C. YOST
Deputy Attorney General
6000 State Building
San Francisco, California 94102
Telephone: (415) 557-2204

Attorneys for State of California,
Department of Transportation

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

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| BRITISH AIRWAYS BOARD and COMPAGNIE NATIONALE AIR FRANCE,<br><br>Plaintiffs,<br><br>v.<br><br>THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY, WILLIAM J. RONAN, W. PAUL STILLMAN, JAMES G. HELLMUTH, VICTOR R. RANITELLI, ANDREW C. AXTELL, GEORGE F. BERLINGER, MILTON A. GILBERT, ROBERT R. DOUGLASS, JAMES C. KELLOGG, III, GUSTAV L. LEVY, MATTHEW NIMETZ, ALAN SANGER, Commissioners of the Port Authority of New York and New Jersey,<br><br>Defendants. | NO. CIV. 1276 (MP)<br><br>BRIEF AMICUS CURIAE OF THE STATE OF CALIFORNIA IN SUPPORT OF THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY |

## INTEREST OF AMICUS

The State of California by and through its Department of Transportation respectfully submits its brief as amicus curiae. California is presently engaged in litigation raising the identical issue to the one in this case—the authority of an airport proprietor to control noise around its airport by controlling the conditions of use of that airport. Both foreign and domestic airlines[1/] are plaintiffs in the California suit. The matter is now pending before a three-judge district court, defendant California having filed its certificate of readiness for trial. That court's initial opinion is reported. Air Transport Association, et al., v. Crotti, et al., 389 F.Supp. 58 (1975).

## ARGUMENT

### I. INTRODUCTION

Plaintiffs in their Memorandum in Support of Their Motion for Summary Judgment demonstrate a relentless instinct for the capillary, plunging into every vien of argument except the jugular—the authority of the airport proprietor to exclude aircraft based upon noise considerations. Plaintiffs, for understandable reasons, have chosen to relegate the one pertinent issue to the last part of their discussion. Plaintiffs Memorandum, supra, at 32 et seq. That issue is then discussed in a less than accurate fashion.

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1. The members of plaintiff Air Transport Association "include virtually all United States scheduled air carriers operating in interstate and foreign commerce, . . ." Air Transport Ass'n. v. Crotti, supra, 389 F.Supp. 58, 60. Foreign air carrier plaintiffs include Air Canada and Canadian Pacific Air Lines, Inc. Domestic air carrier plaintiffs include Air California; American Airlines, Inc.; Braniff Airways, Incorporated; Continental Air Lines, Inc.; Delta Air Lines, Inc.; Eastern Air Lines, Inc.; The Flying Tiger Line, Inc.' Hughes Air Corp., dba Hughes Air West; National Airlines, Inc.; Northwest Airlines, Inc.; Pacific Southwest Airlines; Pan American World Airways; Texas International Airlines, Inc.; Trans World Airlines, Inc.; United Air Lines, Inc.; and Western Air Lines, Inc. Defendants include several state and local governmental officials and five airport proprietors.

## II. AMERICAN LAW PROVIDES THAT THE AIRPORT PROPRIETOR HAS THE AUTHORITY TO EXCLUDE AIRCRAFT BASED ON NOISE CONSIDERATIONS

### A. The Critical Case—Griggs v. Allegheny County.

American law as it relates to the authority of airport proprietors turns on one case—Griggs v. Allegheny County, 369 U.S.84, 82 S.Ct. 531, 7 L.Ed.2d 585 (1962). In that case a majority of the United States Supreme Court held that the airport proprietor is the one (rather than the Federal Government or some other potential defendant) liable for the noise occasioned by the aircrafts' use of an airport.[2/]

The issue of liability for aircraft noise and the authority to diminish that liability by diminishing that noise are inextricably intertwined. He who is liable is he who can control.

> "It is now firmly established that the airport proprietor is responsible for the consequences which attend his operation of a public airport; his right to control the use of the airport is a necessary concomitant, whether it be directed by state police power [footnote omitted] or his own initiative. United States v. Causby, 328 U.S. 256, 66 S.Ct. 1062, 90 L.Ed 1206 (1946); Griggs v. Allegheny County, 369 U.S. 84, 82 S.Ct. 531, 7 L.Ed.2d 585 (1962). See Aaron et al. v. City of Los Angeles, 40 Cal. App.3d 471, 115 Cal. Rptr. 162 (1974), and authorities cited at 175, cert. denied 419 U.S. 1122, 95 S.Ct. 806, 42 L.Ed.2d 822 (1975). [Footnote omitted.] That correlating right of proprietorship control is recognized and exempted from judicially declared federal pre-emption by footnote 14 [to City of Burbank v. Lockheed Air Terminal, 411 U.S. 624, 635-636, 93 S.Ct. 1854, 1861 (1973)]. Manifestly, such proprietary control necessarily includes the basic right to determine the type of air service a given airport proprietor wants its facilities to provide, as well as the type of aircraft to utilize those facilities." Air Transport Association v. Crotti, supra, at 63-64.

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2. The dissenters asserted that the Federal Government should be liable.

There is a "clear Congressional intention that airport proprietors continue to be permitted to deny the use of their airports to aircraft on the basis of noise considerations so long as such exclusion was nondiscriminatory." National Aviation, et al. v. City of Hayward, ___F.Supp. ___ (N.D.Cal. No. C-75-2279 RFP, slip opinion dated July 13, 1976), at 12.[3/]

The District Court in National Aviation explains the state of the law:

> "The rationale underlying this special treatment for airport proprietors can be traced to another Justice Douglas opinion—Griggs v. Allegheny County, 369 U.S. 84 (1962).
>
> "Griggs held that an airport operator is financially responsible to nearby property owners for property damage resulting from aircraft noise from overflying commercial flights. The court held that such noise constituted a 'taking' of an 'air easement' over the property of the plaintiff. The court viewed the county's obligation to obtain air easements as just another part of its responsibility to acquire sufficient land for the airport pursuant to its power of eminent domain. Significantly, the court rejected the contention that it was the United States government that should be liable for the 'taking,' having required the airport to have been constructed according to federal requirements and having guaranteed through the Federal Aviation Act a 'public right of freedom of transit in air commerce through navigable airspace.' See 369 U.S. at 93-94 (Black, J. dissenting.)" Id, at 12-13.

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3. The case of National Aviation v. City of Hayward is the most recent decision on the subject of airport proprietors' authority to regulate aircraft noise. For the convenience of the Court it is attached as Appendix 1.

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B. All Three Branches of Government Continue to Recognize the Authority of the Airport Proprietor.

The Congress, the administrative officials responsible for implementing the law, and the courts have all declined to take such action as would shift liability for aircraft noise from the airport proprietor of the Federal Government.

1. The Congress Continues To Recognize The Authority of The Airport Proprietor

A brief history of federal legislation subsequent to Griggs bearing upon aircraft or airport noise will help illuminate just what has been and what has not been preempted. Prior to 1968 there was no federal legislation regulating aircraft or airport noise.[4/] The Federal Aviation Act of 1958[5/] was occasioned by the need for centralizing diverse agencies within the federal government with safety as a goal. 49 U.S.C. § 1301 et seq., see Hearings Before the Subcommittee on Aviation of the Senate Commerce Committee, Federal Aviation Agency Act, 85th Cong., 2d Sess., at 179, 184-185.

a. 1963 - The "Harris Committee" Report and the Status of the Law

The Harris Committee Hearings and the subsequent Harris Committee Report were probably the first exposure of Congress to the problem of aircraft noise and scientific opinion regarding noise abatement. Danforth, Mercury's Children in the Urban Trap: Community Planning and Federal Regulation of the Jet Noise Source, 3 Urban Lawyer 206, 211; H. Rep. No. 36, 88th Cong., 1st Sess.,

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4. One provision did require airport proprietors to take action regarding land use with noise as a consideration as a condition of Federal grants. (See discussion, pp. 15, infra.)

5. This act, as amended, remains the basic applicable law.

/

Investigation and Study of Aircraft Noise Problems (1963). (Hereinafter cited as "Harris Committee Report.") The Committee[6] summarized the then state of intergovernmental regulation as regards aircraft noise.

First, the committee noted that the "FAA does not have and does not seek authority . . . to formulate rules and regulations as to noise in the design of either powerplants or aircraft." Harris Committee Report, supra, at 22. "The FAA has stated," continued the Report, "that until there has been devised some valid criterion for the measurement of subjective annoyance features of aircraft noise, it would prefer not to have any regulatory authority in this field . . . ." Ibid.

The Committee then went on to place the responsibility for the control of aircraft noise squarely on state and local government:

> "It has been assumed in some quarters that any and all governmental authority over aircraft noise must necessarily rest with the Federal Government . . . . (See Allegheny Airlines, Inc. v. Village of Cedarhurst, 132 F.Supp. 871 (E.D.N.Y. 1955), aff'd. 238 F.2d 812 (2d Cir. 1956). This assumption has been made, notwithstanding the existence in many American cities of an antinoise ordinance enforced against automobiles and trucks including those engaged in interstate commerce. The reluctance of local or State governments to exercise their police powers in this regard and their eagerness to deposit this problem child on the attractive doorstep of the Federal Government are major obstacles to any solution. The usual device used for the protection of the peace and quiet and tranquility of any neighborhood is the local police power. While enforcement of an anti-noise ordinance would undoubtedly necessitate the expenditure of funds to procure acoustical equipment and to train people to operate it, there appears to be no serious legal obstacle to the successful

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6. The Harris Committee was a subcommittee of the House Committee on Interstate and Foreign Commerce. Its report was issued in 1963. It was that same House Committee which in 1958 had reported the Federal Aviation Act. As the Supreme Court has noted, the statement by a Congressional committee which reported an act made five years after passage of that act is "virtually conclusive as to the significance of that Act." Sioux Tribe v. United States, 316 U.S. 317, 329-330 (1942).

exercise of such local governmental authority. (See Huron Portland Cement Co. v. City of Detroit, 355 Mich. 227, 93 N.W. 2d 888) (1959)." Id., at 22-23.

In addition to police power rights, the Committee referred to the existence of proprietors' rights:

> "It addition to the local municipal government powers, the airport operators assert the existence of certain proprietary rights as a landlord . . . . The same right has been found adequate to cope successfully with the ground airport noise problem. . . . The right has been exercised to preclude flights of stipulated type of aircraft onto the airport . . . . This authority has been exercised to establish restricted runways . . . . The validity of these asserted rights has been challenged but not litigated . . . ." Id., at 23.

The committee went on to emphasize that what was needed was cooperation of the aviation industry, local municipal authorities, state governments, and the federal government. Id., at 24-25.

The committee then made its "Findings of Fact," which include:

> "7.01: The FAA has authority to promulgate air traffic rules and regulations governing the operation of aircraft in flight so as to minimize noise and other hazards to persons and property on the ground.
>
> "7.02: Interstate and international air commerce is considered to be in the sole domain of the Federal Government. The Federal Government, however, has not exercised its authority in conjunction with any enactment which would attempt to establish an aircraft noise criterion.
>
> "7.03: Until Federal action is taken, the local governmental authorities [7/] must be deemed to possess the police power necessary to protect their citizens and property from the unreasonable invasion of aircraft noise. The wisdom of exercising such power or the manner of the exercise is a problem to be resolved on the local governmental level.

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7. The term "local governmental authority" as used in paragraph 7.03 appears to encompass both "states" and "municipalities" in that paragraph 7.04 uses the term to describe a power that can be exercised by either a state or municipality.

/

"7.04: There is no evidence of any effort by any State or municipality to exercise local governmental authority to control the impact of aircraft noise upon the community.

"7.05: Airports in the United States, as a general rule, are operated by a local governmental authority, either a municipality, a county, or some independent unit. These airport operators are closer, both geographically and politically, to the problem of the conflict of interests between those citizens who have been adversely affected by the aircraft noise and the needs of the community for air commerce. Some airport operators have exercised the proprietary right to restrict in a reasonable manner, the use of any runway by limiting either the hours during which it may be used or the types of civil transport aircraft that may use it.

"7.06: The Federal Aviation Agency has and has exercised the authority to establish a preferential runway system for any airport.

"7.07: The local governmental authorities appear to be reluctant to exercise their governmental prerogatives other than police power, to partially relieve its citizens who are anguished by aircraft noise." (Emphasis added.) Id., at 27.

After its "Findings of Fact" the committee went on to its "Recommendations," which include:

"14. Local government, be it city, county, or State, should explore the wisdom of the reasonable exercise of police power to effectuate a reduction in the impact of aircraft noise upon persons and property in the community.

"15. Airport operators, in consultation with FAA, where it is essential to the peace of an adjacent community, should explore the need to develop restrictions on the use of runways with regard to either hours of the day or types of aircraft." (Emphasis added.) Id., at 28.

What then was the state of the law in 1963? Nobody was doing very much, and the Congressional Committee charged with overseeing the area was inviting state and local governments to do a lot more. As we shall see, the legislative histories of subsequent enactments reiterate an intention not to change the degree of preemption as it existed prior to the enactment of the subsequent statutes.

b. 1968 Amendments To The Federal Aviation Act

i. Scope of the 1968 Act. In 1968 the Congress first ventured, in a limited manner, into the field of aircraft noise. The 1968 act added § 611 to the Federal Aviation Act (49 U.S.C. § 1431 (since amended by the Noise Control Act of 1972)). Basically the act directed the Administrator or the Federal Aviation Administration to prescribe and amend standards for the measurement of aircraft noise and sonic boom and prescribe regulations for the control and abatement of aircraft noise and sonic boom. Pub. L. 90-41, 82 Stat. 395.

The House and Senate Reports put the statute into perspective. There are, said both reports, three ways of dealing with the problem of aircraft noise:

(a) Source - The Airplane.

(i) Described in the Senate Report as "development of aircraft which generate less noise." S. Rep. No. 1353, 90th Cong. 2d Sess., at U.S. Code Cong. and Adminis. News. 2690.

(ii) Described in the House Report as "new or modified engine and airplane designs, . . ." H.R. Rep. No. 1463, 90th Cong., 2d Sess., at 4.

(b) Operating Techniques.

(i) Described in the Senate Report as "the establishment of special flight operating techniques and procedures." S. Rep. No. 1353, supra, at 2690.

(ii) Described in the House Report as "special flight operating techniques and procedures, . . ." H.R. Rep. No. 1463, supra, at 4.

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(c) Land Use.

(i) Described in the Senate Report as "planning for land use in areas near airports so as to make such use compatible with aircraft operations." S. Rep. No. 1353, supra, at 2690.

(ii) Described in the House Report as "planning for land use in areas adjacent to airports so that such land use will be most compatible with aircraft operations." H.R. Rep. No. 1463, supra, at 4.

The 1968 amendments were directed at the first of these three techniques--the airplane itself, source of the noise. "This legislation," said the House Report, is directed "toward the primary problem; namely reduction of noise at its source." H. R. Rep. No. 1463, supra, at 4. "While all of these techniques must be thoroughly studied and employed," said the Senate Report, "the first order of business is to stop the escalation of aircraft noise by imposing standards which require the full application of noise reduction technology." S. Rep. No. 1353, supra, at 2690; see Larsen, Improving the Airport Environment: Effect of the 1969 FAA Regulations on Noise, 55 Iowa L. Rev. 808, 814 (1970).

The scope of the Act (when it was in bill form) was aptly described to the House Committee by John E. Stephen, General Counsel of Air Transport Association:

> "We think it is important that Congress the airport operators, the public, and local governments be aware that a bill such as H.R. 3400 deals with only a very small piece of the aircraft noise problem. It deals, moreover, in a way that cannot possibly afford what has been referred to as a 'solution' to the noise problem.

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> "In the first place, the bill deals with only one element of the three elements of the problem, that is to say, reduction of aircraft noise at the source. It has nothing to do with controlling environment on the ground, which is essential feature of any true solution to the aircraft noise problem." Hearings before the Subcommittee on Transportation and Aeronautics of the House Committee on Interstate and Foreign Commerce, on H.R. 3400 and H.R. 14146, 90th Cong., 1st and 2nd Sess., at 87; see Id., at 93, 96.

ii. Preemption Under the 1968 Act. What effect did the 1968 amendments have on preemption? Again the legislative history gives guidance. As stated in the Senate Report, "the question is raised whether this bill adds or subtracts anything from the powers of State or local governments." The committee then answered its own question: "It is not the intent of the committee in recommending this legislation to effect any change in the existing apportionment of powers between the Federal and State and local governments." S. Rep. No. 1353, 90th Cong. 2nd Sess., supra, at 2693.

The committee then went on to quote with approval from Secretary Boyd's letter to the committee of June 22, 1968 (which letter in its entirety appears as Appendix 2 to this brief):

> "The courts have held that the Federal Government presently preempts the field of noise regulation insofar as it involves controlling the flight of aircraft. Local noise control legislation limiting the permissible noise level of all overflying aircraft has recently been struck down because it conflicted with Federal regulation of air traffic. American Airlines v. Town of Hempstead, 272 F.Supp. 226 (U.S.D.C., E.D., N.Y., 1966). The court said, at 231, 'The legislation operates in an area committed to Federal care, and noise limiting rules operating as do those of the ordinance must come from a Federal source.' H.R. 3400 would merely expand the Federal Government's role in a field already preempted. It would not change this preemption. State and local governments will remain unable to use their police powers to control aircraft noise by regulating the flight of aircraft.

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"However, the proposed legislation will not affect the rights of a State or local public agency, as the proprietor of an airport, from issuing regulations or establishing requirements as to the permissible level of noise which can be created by aircraft using the airport. Airport owners acting as proprietors can presently deny the use of their airports to aircraft on the basis of noise considerations so long as such exclusion is nondiscriminatory.

"Just as an airport owner is responsible for deciding how long the runways will be, so is the owner responsible for obtaining noise easements necessary to permit the landing and takeoff of the aircraft. The Federal Government is in no position to require an airport to accept service by larger aircraft and, for that purpose, to obtain longer runways. Likewise, the Federal Government is in no position to require an airport to accept service by noisier aircraft, and for that purpose to obtain additional noise easements. The issue is the service desired by the airport owner and the steps it is willing to take to obtain the service. In dealing with this issue, the Federal Government should not substitute its judgment for that of the States or elements of local government who, for the most part, own and operate our Nation's airports. The proposed legislation is not designed to do this and will not prevent airport proprietors from excluding any aircraft on the basis of noise considerations." Id., at 2693-2694. (Emphasis added.)

As noted by the three-judge court in Crotti:

"The intent of Congress not to interfere with such basic airport control is made clear in the legislative history of §611 of the Federal Aviation Act of 1958. S.Rep. No. 1353, 90th Cong., 2d Sess., at 7.

'The Federal Government is in no position to require an airport to accept service by larger aircraft and, for that purpose to obtain longer runways. Likewise, the Federal Government is in no position to require an airport to accept service by noisier aircraft, and for that purpose to obtain additional noise easements. The issue is the service desired by the airport owner and the steps it is willing to take to obtain the service. In dealing with this issue, the Federal Government should not substitute its judgment for that of the States or elements of local government who, for the most part, own and operate our Nation's airports. The proposed legislation is not designed to do this and will not prevent airport proprietors from excluding any aircraft on the basis of noise considerations.'" Air Transport Association v. Crotti, supra, 389 F.Supp. 58, 64 (1975).

The House Report was less specific, but equally insistent upon a state and local role. After stating that the proposed legislation was directed toward reduction of the noise at its source, the committee went on to say that it "expects" all concerned including "State and local . . . governmental entities to continue and increase their contributions toward the common goal of quiet." H.R. Rep. 1463, 90th Cong., 2d Sess., at 4.

iii. Regulations Under the 1968 Act. In 1969 the FAA initiated the implementation of the 1968 amendments with the adoption of "Part 36" of the Federal Aviation Regulations. 14 C.F.R. Part 36; 34 Fed.Reg. 18355 et seq., Nov. 18, 1969. (The two additional regulations subsequently adopted are discussed infra, at pp. 22-23.) These regulations are directed at the manufacturer and seek to insure that as a condition of "type certification" a new aircraft type (such as the DC 10, L1011, etc.) meets certain noise limits under specified conditions. 14 C.F.R. Part 36; 34 Fed. Reg. 18355, 18361; Larsen, Improving the Airport Environment: Effect of the 1969 FAA Regulations on Noise, 55 Iowa L. Rev. 808, 814 (1970). In adopting the regulations the FAA was careful to note that "the takeoff test conditions in this amendment, being type certification conditions only, do not in any way affect the operation of aircraft at airports." 34 Fed.Reg. 18355, Nov. 18, 1969; see Id., at 18357, 18359. The FAA has had recent occasion to reiterate its position. In dismissing an objection to extending the Part 36 requirements to newly produced airplanes of older type designs, the FAA had this to say:

> "This comment appears to miss the essential purpose of Part 36, which is to not only set noise limits but require that these limits be met with the airplane developing substantial power in order to force the development of real acoustical design

improvements rather than permit compliance through quiet piloting techniques." 38 Fed.Reg. 29573 (Oct. 26, 1973.)

Part 36, we reemphasize, is directed at the source of the noise, not at the operation of the aircraft. The Part 36 regulations are themselves insistent that planes meeting the levels set are not found to be "acceptable" for operation at a particular airport. "No determination is made, under this part, that these noise levels are or should be acceptable or unacceptable for operation at, into, or out of, any airport." 14 C.F.R. § 36.5, see § 36.1581.

An aircraft type must be certified before aircraft of that type are permitted to fly. The measurements are done under standardized conditions. The regulations are not directed at how an individual aircraft is operated landing or taking off at an individual airport.

The difference may be likened to a safety standard for a new automobile--a restriction imposed upon the manufacturer. It is in no way incompatible with an operational statute such as a speed limit to insure that the car is not operated in excess of particular limits deemed to be safe--a restriction directed at the operator (driver).

To quote two law review articles, "The FAA noise regulation does not provide for the situation where a flight crew operates a plane differently than the way it was originally tested." Larsen, Improving the Airport Environment: Effect of the 1969 FAA Regulations on Noise, 55 Iowa L. Rev. 808, 819 (1970).

> "Thus the distinction between federal definition of source noise reduction limits and non-federal definition of airport noise compatibility requirements is consistently preserved in Part 36. This distinction appears in the regulatory distinction between the concept of 'approval' and the concept of 'acceptability.' Whereas, in the case of safety, approval of a type design connotes a federal

determination that the design complies with prescribed levels of safety that are acceptable in the public interest, no corresponding determination, is made for noise under Part 36." Danforth, Mercury's Children in the Urban Trap: Community Planning and Federal Regulation of the Jet Noise Source, 3 Urban Lawyer 206, 218 (1971).

c. 1970 - Airport and Airways Development Act.

In 1970 the Congress enacted the Airport and Airways Development Act which not only acknowledges the existence of obligations upon airport proprietors but specifically requires proprietors as a condition of Federal funding for further development to give adequate assurances to the FAA that:

> "As a condition precedent to his approval of an airport development project under this subchapter, the Secretary shall receive assurances in writing, satisfactory to him, that . . .
>
> (4) appropriate action, including the adoption of zoning laws, has been or will be taken, to the extent reasonable, to restrict the use of land adjacent to or in the immediate vicinity of the airport to activities and purposes compatible with normal airport operations, including landing and takeoff of aircraft; . . ." 49 U.S.C. § 1718. 8/

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8. The particular section recodified an earlier, 1964, provision. Act of March 11, 1964, P.L. 88-280, § 10(1), 75 Stat. 161. The implication of this section was fully known to the sponsoring congressional committee. As quoted by the Ninth Circuit in interpreting this section,

> "'The committee does recognize, however, that airport sponsors are public agencies with a voice in the affairs of the community in which the airport development is undertaken and should be required to use such influence as they might have in a reasonable manner to assure proper zoning of land near the airport, to assure that schools are not built in the flight path of aircraft taking off or landing at the airport, and to discourage the development of residential housing (including apartments) in areas where noise levels would make such development unwise.' [Emphasis added.] 1964 Code Cong. and Admn. News, p. 2069." (Inglewood v. City of Los Angeles, 451 F.2d 948, 955, n. 14 (9th Cir. 1972).)

d. 1970 - Noise Pullution and Abatement Act.

1970 also saw the enactment of the Noise Pollution and Abatement Act of 1970, 42 U.S.C. § 1858 et seq., which required the Environmental Protection Agency to investigate and study noise and report to the President and Congress by December 31, 1971. 42 U.S.C. § 1850(a), (b). That study was made and that report rendered. U.S. Environmental Protection Agency, The Report to the President and Congress on Noise, December 31, 1971 (NRC 500.1). This report, delivered to Congress at the close of 1971, was to form the basis for the Congressional response in 1972, the ultimate result of which was the Noise Control Act of 1972.[9/]

e. 1972 - Noise Control Act.

i. The Scheme of the Noise Control Act. The Noise Control Act creates the concept of "environmental noise," which is defined by the statute as "the intensity, duration, and the character of sounds from all sources." 42 U.S.C. § 4902 (11). The concept, which originated in the Senate and appeared in the Senate bill but not in the House bill, is further described in the Senate Report:

> "The concept of 'environmental noise' is used through the bill to describe the overall level of noise in a given area to which individuals are exposed, including the intensity, duration, and character of sounds from all sources. It

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9. Both the House and Senate Reports on the Noise Control Act of 1972 relied on the EPA report. H.R. Rep. No. 92-842, 92nd Cong., 2d Sess. (1972) 4-5; S. Rep. No. 92-1160, 92nd Cong., 2d Sess. (1972) 2. In the words of the House Report (at 5):

> "The EPA 'Report to the President and the Congress on Noise' was submitted to the Congress on January 26, 1972. In the opinion of your Committee, the report substantiates the urgent need for a coordinated Federal, State and local effort to control and abate noise in order to protect the public health and welfare and demonstrates the need for legislation such as that recommended in the reported bill."

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also includes the concept of a limitation on noise which would be applicable to every individual source in such a defined geographic area." S. Rep. No. 92-1160, 92nd Cong. 2d Sess. (1972), p. 6; also see 118 Cong. Rec. S17752 (daily ed. Oct. 12, 1972) (remarks of Senator Tunney to the same effect).

The Senate Report continued by saying that "the intention of the whole bill is to protect public health and welfare from environmental noise, . . ." S. Rep. No. 92-1160, supra at 7; also see 118 Cong. Rec. S17752 (daily ed. Oct. 12, 1972) (remarks of Senator Tunney).

The concept of environmental noise control presupposes control over the various sources of noise in the environment (as specified by the above-quoted Senate Report). A governmental agency to control the total level of noise must be able to control its component parts. It is to state and local governments that the overall control of environmental noise has been assigned (or perhaps reserved) by the Congress, which found that "primary responsibility for control of noise rests with State and local governments, . . ." 42 U.S.C. § 4901(a)(3). Congress then made four exceptions to the general rule, finding Federal action to be essential to deal with major noise sources in commerce "control of which require national uniformity of treatment." Ibid. Exceptions to the general scheme of an act are to be strictly construed. Spokane and Inland Empire RR Co. v. United States, 241 U.S. 344, 350 (1916). The exceptions are:

(a) For "products" generally (a category not including aircraft of their components) regulations directed at the manufacturer are assigned to the Federal government while states and political subdivisions thereof may "establish and enforce controls on environmental noise (or one or more sources thereof) through the licensing, regulation, or restriction of the use,

operation, or movement of any product or combination of products." 42 U.S.C. §§ 4902(3), 4905(e); S. Rep. No. 92-1160, supra, at 7; H.R. Rep. 92-842, supra, at 8.

(b) For "railroads" there are more stringent preemption provisions. 42 U.S.C. § 4916(c); S. Rep. No. 92-1160, supra, at 8.

(c) For interstate "motor carriers" there are similarly stringent preemption provisions. 42 U.S.C. § 4917(c); S. Rep. No. 92-1160, supra, at 8.

(d) For "aircraft," "There is, to be sure," in Justice Douglas' words for the majority in Burbank, "no express provision of preemption in the 1972 Act." Burbank v. Lockheed, supra, at 633. There is, of course, the holding in Burbank itself.

Again, the overall legislative scheme must be emphasized. It is to state and local governments that "primary responsibility" for control of environmental noise has been committed. For understandable reasons the Federal government assumed certain control over interstate commerce related sources of noise such as regulations directed at manufacturers of items that will be distributed in interstate commerce and related to those mobile sources that themselves move in interstate commerce. But these source-related exceptions must be seen for what they are--exceptions to the general Congressional assignment of "primary responsibility"--and construed as such, which is to say--narrowly.

ii. Aviation Noise and the Noise Control Act. Within the context of the Noise Control Act as a whole, what does that Act do with respect to aircraft noise? Essentially it does two things: (1) it requires an EPA study, and (2) it amends § 611 of the Federal Aviation Act so as to provide for EPA input into the FAA's decision making process while directing that process

at relief and protection to the public health and welfare.[10]

More specifically, the Administrator of the Environmental Protection Agency was to conduct a "study" of the:

> "(1) adequacy of Federal Aviation Administration flight and operational noise controls; (2) adequacy of noise emission standards on new and existing aircraft, together with recommendations on the retrofitting and phaseout of existing aircraft; (3) implications of identifying and achieving levels of cumulative noise exposure around airports; and (4) additional measures available to airport operators and local governments to control aircraft noise." 42 U.S.C. § 4907.

He shall report on such study to designated Congressional committees. Ibid.

The Federal Aviation Act's section 611 (49 U.S.C. §1431) adopted in 1968 was amended. A purpose clause was inserted gearing the process to "public health and welfare."[11] Ibid. The Federal Aviation Administration's authority to prescribe standards for the measurement, control and abatement of aircraft noise is retained. Ibid. FAA must now consult with the Environmental Protection Administration (EPA). The responsibility

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10. We note that according to the Federal government there are now eight different Federal agencies with authority to act in the field of aircraft/airport noise. EPA, Legal and Institutional Analysis, at 2-38.

11. The previous introductory phraseology of § 611 ("In order to afford present and further relief and protection to the public from unnecessary aircraft noise and sonic boom") was supplemented by the reference to "public health and welfare" ("In order to afford present and future relief and protection to the public health and welfare from aircraft noise and sonic boom"). Ibid. "Public health and welfare" is a term of art within the Noise Control Act. 42 U.S.C. §§ 4901(b), 4904(a). The phrase is one which appears in the earlier Clean Air Act (42 U.S.C. §§ 1857(b)(1), 1857c-4(b)).

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of FAA with regard to type certification and noise is emphasized. EPA is now to propose regulations to FAA.[12/] FAA is to consider such proposals and decide whether or not to adopt them. EPA can request FAA to reexamine FAA's findings. The five considerations which FAA is to take into account remain essentially the same. Existing regulations continue in effect until modified. Ibid.

There being no express preemption in the 1972 Act, what does the legislative history of the Act show with respect to preemption? Both Justice Douglas for the five-man majority and Justice Rehnquist for the four dissenters quote from both the Senate and House Reports on the Noise Control Act to the effect that no provision of the bill was intended to alter the relationship between Federal, state, and local governments with respect to matters covered by § 611 of the Federal Aviation Act prior to enactment of the bill. Burbank v. Lockheed, supra, at 634 (majority), 641-642 (dissent). In fact the reports of both Senate and House show a clear intent to preserve the status quo ante.

The House Report states:

> "No provision of the bill is intended to alter in any way the relationship between the authority of the Federal Government and that of State and local governments that existed with respect to matters covered by section 611 of the Federal Aviation Act of 1958 prior to the enactment of the bill." H.R. Rep. No. 92-842, 92nd Cong., 2d Sess. (1972), at 10.

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12. Justice Douglas sets out a schedule within which EPA is to propose regulations to the FAA. Burbank v. Lockheed, supra, p. 630. He states, "Section 611(c)(1), as amended, provides that not later than July 1973 EPA shall submit to FAA proposed regulations. . . ." Ibid. The statement is legally wrong. 49 U.S.C. § 1431. Section 611(c)(1) says that not earlier (rather than not later) than the particular date the regulations are to be proposed. In fact there is no date in the Noise Control Act by which such regulations are to be proposed.

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The Senate report is to similar effect. (The first sentence referred to a preemptive provision in the Senate bill concerning "noise emission standards" not adopted by the Congress.)[13/] [14/]

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13. The bill which initially passed the senate explicitly provided for preemption. (118 Cong. Rec. S. 18013 (daily ed. Oct. 13, 1972) § 505; see 118 Cong. Rec. S. 17989 (daily ed. Oct. 13, 1972) (remarks of the Senator carrying the bill, Senator Tunney); also see 118 Cong. Rec. S. 17749, 17753 (daily ed. Oct. 12, 1972) § 506.) The bill as it passed the House contained no such provision. (118 Cong. Rec. H. 1523-1527 (daily ed. Feb. 29, 1972).) The bill as finally adopted by the Congress did not contain the Senate's provision preempting the field of aircraft noise reduction. (42 U.S.C. §§ 4901-4918; 49 U.S.C. § 1431; 118 Cong. Rec. H. 10295-10300 (daily ed. Oct. 18, 1972).)

14. Congress is quite capable of making explicit (as the Senate bill did) its intentions regarding preemption. The very subject now before this court, aircraft-caused pollution, illustrates the point dramatically. In the field of aircraft-produced air pollution there is a clear Congressional directive to preempt. By way of contrast, in the field of aircraft-produced noise pollution there is a clear Congressional attempt not to preempt.

Regarding aircraft-produced air pollution, Congress has said (in the Clean Air Amendments of 1970):

> "No State or political subdivision thereof may adopt or attempt to enforce any standard respecting emissions of any air pollutant from any aircraft or engine thereof unless such standard is identical to a standard applicable to such aircraft under this part." 42 U.S.C. § 1857f-11.

By way of contrast, in the Federal Aviation Act (which includes the regulation of aircraft-produced noise pollution) Congress has said:

> "Nothing contained in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies." 49 U.S.C. § 1506.

The difference in language makes manifest the difference in Congressional intent. See Head v. Board of Examiners, 374 U.S. 424, 443-444 (1963) (concurring opinion of Brennan, J.); Loma Portal Civic Club v. American Airlines, Inc., 61 Cal.2d 582, 39 Cal.Rptr. 708, 394 P.2d 548, 555 (Cal. S.C. 1964).

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During consideration of the act on the House floor, Congressman Mikva offered an amendment to propose a study of the possibility of establishing curfews at airports. 118 Cong. Rec. H1534 (daily ed., Feb. 29, 1972). This amendment was defeated in part because the proprietors already had the power to impose curfews. Id., at H1535-1536. "There would not be one plane going in or out of O'Hare Field after 11 o'clock at night if the local airport authority did not approve it," said Congressman Collier. Ibid. "So it is well and good to suggest bringing the complaints to Washington and have the FAA do the job when in reality the responsibility presently exists with the local airport authority." Id., at H1536. The amendment was then rejected.

c. Post Noise Control Act Regulations. Two regulations have been actually adopted (as distinct from advance notices of proposed rule-making and notices of proposed rule-making)[15/] since adoption of the Noise Control Act. One prohibits the supersonic flight of civil aircraft over land. 38 Fed. Reg. 8051, March 28, 1973.[16/] The other extends the requirements

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15. This refers to Federal Register entries, not to studies, evaluations, advice, informal policies, etc. Advisory circulars inform the public of nonregulatory material of interest. They are not binding as regulations.

16. No SSTs are at present in commercial operation in the United States apart from the current service to Dulles.

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of Part 36 to newly produced airplanes of older type designs.[17]

The federal agency now responsible for proposing regulations under the Noise Control Act has concluded, "Based on this Agency's studies, it appears that existing FAA flight and operational controls [footnote omitted] do not adequately protect the public health and welfare from aircraft noise."[18] EPA, Report on Aircraft-Airport Noise, at 14; see Id., at 15-20.

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17. It is worth noting that in its rulemaking concerning "Noise Standards for Newly Produced Airplanes of Older Type Designs" the FAA, when requested to prepare an environmental impact statement pursuant to the National Environmental Policy Act of 1969, declined in the following terms:

> "After review of the potential impact of this amendment, the FAA believes that the amount of noise reductions involved and the limited number of affected aircraft require the conclusion that this amendment will not cause a 'significant' reduction in the community impact of overall fleet noise." 38 Fed. Reg. 29573 (Oct. 26, 1973).

18. In addition to the regulations described above, one regulation, which precedes the 1968 statutory authorization and which relates to takeoffs, landings, and runways touches tangentially on noise. 14 C.F.R. 91.87.

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2. The Responsible Administrative Officials Continue To Recognize The Authority of The Airport Proprietor.

We have discussed at length the letter of Secretary of Transportation Boyd which played such an important role in the legislative history of the 1968 amendments. (See discussion, supra, at pp. 11-12.)

The Court of Appeal for the Ninth Circuit explained the law as to proprietors in the Burbank case:[19/]

> "The Secretary's [Boyd's] letter emphasizes the status of the one regulating the use of the airport, not the locus of the aircraft when the offensive sounds are produced. A State or local public agency, as the proprietor of an airport, can deny the use of its airport based on noise consideration; [footnote omitted] a State or local government cannot use its police power to do so." [Footnote omitted.] Lockheed Air Terminal, Inc. v. City of Burbank, 457 F.2d 667, 674 (9th Cir. 1972), aff'd. 411 U.S. 624 (1973). [20/]

The court explained the reasoning behind the rights of a proprietor:

> "As the Secretary's letter indicates, this reservation of power to the proprietors of airports to regulate their use derives from Griggs v. Allegheny County, 369 U.S. 84, 82 S.Ct. 531, 7 L. Ed.2d 585 (1962). That case held that Allegheny County, as promoter, owner and lessor of the Greater Pittsburgh Airport, was responsible to pay compensation for easements taken by the operation of the airport.

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19. The Court of Appeal's statement of the law concerning proprietors' rights is in no way contravened by Justice Douglas' reference to a proposal regarding Los Angeles Airport. Burbank v. Lockheed, supra, at 639-640. After the following quote—"The complete FAA statement said:" the majority quoted what was in fact one paragraph exerpted from four pages in the Federal Register. 25 Fed. Reg. 1764-1767 (March 1, 1960). It was the FAA, not the proprietor, that had proposed and rejected its (the FAA's) own suggestion. Id., at 1764. The quote therefore has no bearing on the rights of the proprietor. (The Federal Register entries also preceeded Griggs v. Allegheny County, supra, 369 U.S. 84 (1962).)

20. The Supreme Court quoted Secretary Boyd's letter but concluded a decision on the rights of the proprietor was not essential to the case. City of Burbank v. Lockheed Air Terminal, supra, 411 U.S. 624, 635, n. 14. The court said: "[A]uthority that a municipality may have as a landlord is not necessarily congruent with its police power. We do not consider here what limits, if any, apply to a municipality as a proprietor." Ibid.

> "Pursuant to this proprietorship power, the City of Santa Monica has successfully imposed a curfew, similar to that envisioned by the City of Burbank, on the Santa Monica Airport. Stagg v. Municipal Court, 2 Cal. App. 3d 318, 82 Cal. Rptr. 578 (1969); see In Re Dreifus, FAA Regulatory Docket No. 9071 (7/10/60)." Ibid. n. 8.

While Secretary Boyd was writing his now famous letter to the Senate Committee, his Department, Office of the Secretary, was also transmitting the views of the Department of Transportation to the House Committee. One of those letters, from John L. Sweeney, Assistant Secretary for Public Affairs, Office of the Secretary, Department of Transportation, dated November 15, 1967, to Harley O. Staggers, Chairman of the House Committee on Interstate and Foreign Commerce, resists legislation which would shift liability from the airport proprietor to the Federal government. Hearings before the Subcommittee on Transportation and Aeronautics, House Committee on Interstate and Foreign Commerce, on H.R. 3400, H.R. 14146, Aircraft Noise Abatement, 90th Cong. 1st and 2d Sess., at 2-3. "We know of no rationale," said he, "to justify the assumption by the Federal government of that cost burden." Id., at 3. In a second letter from the same author to the same addressee dated March 1, 1968 (Id., at 8-10), Sweeney explicitly found it "unwise" to take actions which could result in undermining Griggs (Id., at 9). On the part of the Department of Transportation he acknowledged the rights of proprietors and noted that "as ATA concedes in its testimony, the only regulatory authority left to local communities or airport operators is the authority of the airport operator, in the exercise of its proprietary function, to limit on noise grounds the kind of aircraft which may use its facility." Id., at 9.

The FAA has consistently acknowledged the powers and responsibilities of airport proprietors in the field of noise. The FAA's Notice of Proposed Rule Making issued with the

first proposed rules under the 1968 amendment states the following:

> "[T]his notice does not promise a federal substitute for the actions that airport operators, as proprietors, can take and have traditionally and responsibly taken to make their airports fit the particular needs of their locales, such as establishing the conditions under which their airports and airport facilities may be used, including the issuance of specific noise ceilings." (34 Fed. Reg. 457, Jan. 11, 1969.)

In adopting the aircraft-type certification noise standards the FAA notice stated:

> "Relation to responsibility of airport proprietors. Compliance with Part 36 is not to be construed as a Federal determination that the aircraft is 'acceptable,' from a noise standpoint, in particular airport environments. Responsibility for determining the permissible noise levels for aorcraft using an airport remains with the proprietor of that airport. The noise limits specified in Part 36 are the technologically practicable and economically reasonable limits of aircraft noise reduction technology at the time of type certification and are not intended to substitute federally determined noise levels for those more restrictive limits determined to be necessary by individual airport proprietors in response to the locally determined desire for quiet and the locally determined need for the benefits of air commerce. This limitation on the scope of Part 36 is required for consistency with the responsibilities placed upon the airport proprietor by the U. S. Supreme Court in Griggs v. Allegheny County, 369 U.S. 84 (1962). Consistent with this limited scope, this amendment specifies that the Federal Aviation Administration makes no determination, under Part 36, on the acceptability of the prescribed noise levels in any specific airport environment (see §§ 36.5 and 36.1581(a))." 34 Fed. Reg. 18355, Nov. 18, 1969; see Id., at 18356, 18359, 18358, 18359.

The FAA continued:

> "[T]he actual noise generated at a given airport in operation is not a question for type certification, but involves the right of airport proprietors to limit the permissible levels of noise that can be created by aircraft using the airport. If further noise reduction must be achieved at a given airport, the judicial decisions and the legislative history of Public Law 90-411 have made it clear that this is a matter for the airport proprietor." 34 Fed. Reg. 18355, at 18357.

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And further:

> "[T]he primary responsibility for ensuring that airport operation is compatible with surrounding neighborhoods rests with the airport operator." Id., at 18358.

As recently summarized by the three-judge court in Crotti:

> "The preamble to 14 C.F.R., Part 36, emphasizes that local air proprietors have the responsibility for determining the permissible noise levels for aircraft using their airport:
>
> > 'Compliance with Part 36 is not to be construed as a Federal determination that the aircraft is "acceptable," from a noise standpoint, in particular airport environments. Responsibility for determining the permissible noise levels for aircraft using an airport remains with the proprietor of that airport. The noise limits specified in Part 36 are the technologically practicable and economically reasonable limits of aircraft noise reduction technology at the time of type certification and are not intended to substitute federally determined noise levels for those more restrictive limits determined to be necessary by individual airport proprietors in response to the locally determined desire for quiet and the locally determined need for the benefits of air commerce';
>
> "and Section 36.5 of 14 C.F.R. provides:
>
> > '. . . [t]he noise levels in this part have been determined to be as low as is economically reasonable, technologically practicable, and appropriate to the type of aircraft to which they apply. No determination is made, under this part, that these noise levels are or should be acceptable or unacceptable for operation at, into, or out of, any airport.'"
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> Air Transport Association v. Crotti, supra, 389 F.Supp. 58, 64 (1975).

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3. The Courts Continue To Recognize The Authority of The Airport Proprietor.

a. United States Supreme Court

The United States Supreme Court in City of Burbank v. Lockheed Air Terminal, 411 U.S. 624, 93 S.Ct. 1854, 36 L.Ed. 547 (1973), explicitly did not deal with the authority of airport proprietors. Id., at 411 U.S. at 635-636,[21/] 93 S.Ct. at 1861; Air Transport Association v. Crotti, supra, 389 F.Supp. 58, 62-63; National Aviation v. City of Hayward, supra, ___F.Supp. ___ (slip op. p.7).

> "The holding in Burbank is limited to that proscription as constituting an unlawful exercise of police power in a field pre-empted by the federal government, and we take as gospel the words in footnote 14 in Burbank: '[A]uthority that a municipality may have as a landlord is not necessarily congruent with its police power. We do not consider here what limits, if any, apply to a municipality as a proprietor.' (Emphasis supplied.)" Air Transport Ass'n. v. Crotti, supra, 389 F.Supp. 58, 63.

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21. The Supreme Court in Burbank explicitly refrained from deciding the issue in footnote 14 of its opinion (at 411 U.S. 635 and 636, 93 S.Ct. at 1861):

> "The letter from the Secretary of Transportation also expressed the view that the proposed legislation will not affect the rights of a State or local public agency, as the proprietor of an airport, from issuing regulations or establishing requirements as to the permissible level of noise which can be created by aircraft using the airport. Airport owners acting as proprietors can presently deny the use of their airports to aircraft on the basis of noise considerations so long as such exclusion is nondiscriminatory.' (Emphasis added.) This portion as well was quoted with approval in the Senate Report. Ibid.
>
> "Appellants and the Solicitor General submit that this indicates that a municipality with jurisdiction over an airport has the power to impose a curfew on the airport, notwithstanding federal responsibility in the area. But, we are concerned here not with an ordinance imposed by the City of Burbank as 'proprietor' of the airport,

b. Court of Appeal

There is only one decision of a Court of Appeal on the subject of proprietors' authority: Lockheed Air Terminal, Inc. v. City of Burbank, 457 F.2d 667 (9th Cir. 1972), aff'd 411 U.S. 624 (1973).[22] The Ninth Circuit's decision in Burbank is quoted more extensively at page 24 of this brief. In summary, the Court concluded that a "State or local public agency, as the proprietor of an airport, can deny the use of its airport based on noise considerations, . . ." Id., at 674. Conversely, stated the Court, a "State or local government cannot use its police power to do so."[23] Ibid. The Court relied on Griggs, on Secretary Boyd's letter, and on Stagg v. Municipal Court, 2 Cal. App. 3d 318, 82 Cal. Rptr. 578 (1969), a case decided by the California Court of Appeal which upheld the action of a city acting as a proprietor in imposing a curfew upon its airport. Ibid. n.8.

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but with the exercise of police power. While the Hollywood-Burbank Airport may be the only major airport which is privately owned, many airports are owned by one municipality yet physically located in another. For example, the principal airport serving Cincinnati is located in Kentucky. Thus, authority that a municipality may have as a landlord is not necessarily congruent with its police power. We do not consider here what limits, if any, apply to a municipality as a proprietor."

22. As noted previously the Supreme Court in affirming the Ninth Circuit's decision in the Burbank matter did not find it necessary to reach the authority of the proprietor.

23. Plaintiffs in their Memorandum in Support of Their Motion For Summary Judgment quote from the Ninth Circuit's decision in Burbank in a manner that can only be described as misleading. Plaintiffs' Memorandum, pp. 40-41. They quote from the language pertaining to state or local action under the police power. They fail to mention the language (quoted above) pertinent to this case—what the Ninth Circuit had to say about the authority of the proprietor.

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c. District Courts

There have been several cases in the United States District Courts involving the authority of the airport proprietors.

Two of those cases, while not discussing that authority, assume it. Both involve the Port Authority. In one case the authority's regulations restricting runway use (despite FAA permission to use those runways) have been upheld against an airline's attack. Port of New York Authority v. Eastern Airlines, Inc., 259 F.Supp. 745 (E.D.N.Y. 1966). Further regulations of the Port Authority imposing a landing fee to discourage general aviation aircraft from landing during particular hours have also been upheld. Aircraft Owners and Pilots Association v. Port Authority of New York, 305 F.Supp. 93 (E.D.N.Y. 1969).

The two most pertinent cases are now discussed in detail: Crotti and National Aviation.

i. Air Transport Association v. Crotti.

Perhaps the leading case on the subject of the authority of the proprietor is Air Transport Association v. Crotti, supra, 389 F.Supp. 58 (N.D. Cal. 1975). Some analysis of what the Three-Judge Court actually held and said is essential. Two types of regulations were involved in the case. One (CNEL) involved the authority of the proprietors.[24] The other (SENEL) involved a state mandated police power criminal penalty enforced not by the proprietor, but by the county.[25] The Three-Judge Court

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24. Defendants included the individual officers, directors, or managing officials of five airports. Id., at 60. The airport defendants are Los Angeles, Orange, San Diego, San Francisco, and San Jose.

25. Defendants included the District Attorneys of the Counties of Los Angeles, Orange, San Diego, San Mateo, and Santa Clara. In California practice the District Attorney is the county official who brings criminal proceedings. The five counties listed here are the counties in which the five airports listed in the preceeding footnote are located.

invalidated the latter (SENEL). It declined to invalidate the former (CNEL). In the Court's words:

> "Specifically, the regulations fall into two categories: (a) CNEL (Community Noise Equivalent Level) standards prescribed for continued operation of airports with monitoring requirements, which focus upon the arrival of a prescribed ultimate maximum noise level and limiting the land uses subjected thereto around airport facilities; and (b) SNEL [sic] (Single Event Noise Exposure Levels) prohibitions applied to the inseparable feature of noise generated by an aircraft directly engaged in flight." Id., at 62.

The Court described the two completely separate types of regulations in greater detail:

> 1. CNEL. "At the risk of oversimplification, we summarize the objective of the regulations in §§ 5000-5080.5 as achieving a gradual reduction of noise to be suffered at airports operating under California permits to a level at which no residential community is exposed to more than 65 dB as of December 31, 1985 (California Administrative Code § 5012); that level is designated as the Community Noise Equivalent Level (CNEL). By that date, absent the granting of a variance (California Administrative Code §§ 5062, 5075), no incompatible land use is to exist within the 65 dB Noise Impact Boundary). Airports with a noise problem are responsible for establishing the Noise Impact Boundary by monitoring and measuring aircraft noise emissions (California Administrative Code §§ 5013).
>
> "Some of the means available in order to meet California's airport noise standards are set out in Section 5011 of the Administrative Code, which is entitled 'Methodology for Controlling and Reducing Noise Problems,' and which reads as follows:
>
> > 'The methods whereby the impact of airport noise shall be controlled and reduced indlude but are not limited to the following:
> >
> > '(a) Encouraging use of the airport by aircraft classes with lower noise level characteristics and discouraging use by higher noise level aircraft classes;
> >
> > '(b) Encouraging approach and departure flight paths and procedures to minimize the noise in residential areas;
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'(c) Planning runway utilization schedules to take into account adjacent residential areas, noise characteristics of aircraft and noise sensitive time periods;

'(d) Reduction of the flight frequency, particularly in the most noise sensitive time periods and by the noisier aircraft;

'(e) Employing shielding for advantage, using natural terrain, buildings, . . . and

'(f) Development of a compatible land use within the noise impact boundary.

'Preference shall be given to actions which reduce the impact of airport noise on existing communities. Land use conversion involving existing residential communities shall normally be considered the least desirable action for achieving compliance with these regulations.'

"Hence, the Code recommends certain procedures which can be employed in order to attain the established noise reduction standards, but no particular procedure is mandatory. Airport authorities are left to choose among the suggested means at their own discretion, tailoring their own programs to their peculiar needs and inclinations. Furthermore, airport authorities are left free to devise and employ other noise control measures beyond those suggested in the Code." Id., at 61-62.

2. SENEL. "In addition to the continuing CNEL standards prescribed for airports, the California regulations also require the establishment of maximum Single Event Noise Exposure Levels (SENEL) (California Administrative Code §§ 5006(d)). The counties are responsible for enforcement of these limits, and violation of the SENEL by the operator of an aircraft constitutes a misdemeanor punishable by a fine of $1,000 as above noted." Id., at 62.

The Three-Judge Court began its analysis with the Supreme Court's decision in Burbank. Ibid. The Court then summarized the position of plaintiff airlines:

"The Airlines' position narrows to the simple contention that any control and regulation of the levels of noise generated by aircraft in direct flight is pre-empted by the federal government; accordingly, each of the CNEL standards and related

monitoring requirements and SENEL prohibitions are per se void and unenforceable under the holdings of Burbank, . . ." Ibid.

The Court then turned to the position of defendant airports:

"The Airports counter and thrust at that position the exemption of a proprietor of an airport from the pre-emption by the federal government, which such exemption flows from the following footnote 14 to Burbank. . . ." Ibid.

The Court then quoted at length from Burbank's footnote 14.[26] After "homage and respect to the 'presumption of

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26. The Three-Judge Court quoted "The following footnote 14 to Burbank at 635 and 636, 93 S.Ct. at 1841:"

"'14. The letter from the Secretary of Transportation also expressed the view that "the proposed legislation will not affect the rights of a State or local public agency, as the proprietor of an airport, from issuing regulations or establishing requirements as to the permissible level of noise which can be created by aircraft using the airport. Airport owners acting as proprietors can presently deny the use of their airports to aircraft on the basis of noise considerations so long as such exclusion is nondiscriminatory." (Emphasis added.) This portion as well was quoted with approval in the Senate Report. Ibid.

"Appellants and the Solicitor General submit that this indicates that a municipality with jurisdiction over an airport has the power to impose a curfew on the airport, notwithstanding federal responsibility in the area. But, we are concerned here not with an ordinance imposed by the City of Burbank as 'proprietor' of the airport, but with the exercise of police power. While the Hollywood-Burbank Airport may be the only major airport which is privately owned, many airports are owned by one municipality yet physically located in another. For example, the principal airport serving Cincinnati is located in Kentucky. Thus, authority that a municipality may have as a landlord is not necessarily congruent with its police power. We do not consider here what limits, if any, apply to a municipality as a proprietor. (Emphasis supplied.)" Id, at 62-63.

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constitutionality'" (id., at 63) the Court proceeded to its analysis:

> "We believe that the Airlines' total reliance upon Burbank is misplaced. The factual picture supporting Burbank is of narrow focus, a single police power ordinance of a municipality—not an airport proprietor—intending to abate aircraft noise by forbidding aircraft flight at certain night hours. The holding in Burbank is limited to that proscription as constituting an unlawful exercise of police power in a field pre-empted by the federal government, and we take as gospel the words in footnote 14 in Burbank: '[A]uthority that a municipality may have as a landlord is not necessarily congruent with its police power. We do not consider here what limits, if any, apply to a municipality as a proprietor.' (Emphasis supplied.)
>
> "It is now firmly established that the airport proprietor is responsible for the consequences which attend his operation of a public airport; his right to control the use of the airport is a necessary concomitant, whether it be directed by state police power [footnote omitted] or his own initiative. United States v. Causby, 328 U.S. 256, 66 S.Ct. 1062, 90 L.Ed. 1206 (1946); Griggs v. Allegheny County, 369 U.S. 84, 82 S.Ct. 531, 7 L.Ed.2d 585 (1962). See Aaron et al. v. City of Los Angeles, 40 Cal.App.3d 471, 115 Cal. Rptr. 162 (1974), and authorities cited at 175, cert. denied 419 U.S. 1122, 95 S.Ct. 806, 42 L.Ed.2d 822 (1975). [Footnote omitted.] That correlating right of proprietorship control is recognized and exempted from judicially declared federal pre-emption by footnote 14. Manifestly, such proprietary control necessarily includes the basic right to determine the type of air service a given airport proprietor wants its facilities to provide, as well as the type of aircraft to utilize those facilities." Id, at 63-64.

The Court then proceeded to quote at length from the legislative history of the applicable Federal law [27/] and

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27. "The intent of Congress not to interfere with such basic airport control is made clear in the legislative history of § 611 of the Federal Aviation Act of 1958. S.Rep. No. 1353, 90th Cong., 2d Sess., at 7.

> 'The Federal Government is in no position to require an airport to accept service by larger aircraft and, for that purpose to obtain

from the Federal Aviation Administration's implementing regulations.[28/]

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longer runways. Likewise, the Federal Government is in no position to require an airport to accept service by noisier aircraft, and for that purpose to obtain additional noise easements. The issue is the service desired by the airport owner and the steps it is willing to take to obtain the service. In dealing with this issue, the Federal Government should not substitute its judgment for that of the States or elements of local government who, for the most part, own and operate our Nation's airports. The proposed legislation is not designed to do this and will not prevent airport proprietors from excluding any aircraft on the basis of noise considerations.'" Id., at 64.

28. "The preamble to 14 C.F.R., Part 36, emphasizes that local air proprietors have the responsibility for determining the permissible noise levels for aircraft using their airport:

> 'Compliance with Part 36 is not to be construed as a Federal determination that the aircraft is "acceptable," from a noise standpoint, in particular airport environments. Responsibility for determining the permissible noise levels for aircraft using an airport remains with the proprietor of that airport. The noise limits specified in Part 36 are the technologically practicable and economically reasonable limits of aircraft noise reduction technology at the time of type certification and are not intended to substitute federally determined noise levels for those more restrictive limits determined to be necessary by individual airport proprietors in response to the locally determined desire for quiet and the locally determined need for the benefits of air commerce';

"and Section 36.5 of 14 C.F.R. provides:

> '. . . [t]he noise levels in this part have been determined to be as low as is economically reasonable, technologically practicable, and appropriate to the type of aircraft to which they apply. No determination is made, under this part, that these noise levels are or should be acceptable or unacceptable for operation at, into, or out of, any airport.'" Ibid.

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The Court then concluded its opinion by holding the SENEL regulations "and particularly those levying criminal fines" to be unconstitutional. Id., at 65. The Court declined to hold unconstitutional the CNEL regulations.[29]

> "We conclude that the CNEL provisions and regulations are not per se invalid as delving into and regulating a field of aircraft operation engaged in direct flight, which is pre-empted unto the federal government under the Constitution and the laws of the United States." Ibid. [30]

We note that plaintiffs' analysis of Crotti is misleading. See Plaintiffs' Memorandum in Support of Their Motion for Summary Judgment, pp. 34-36, 39. Plaintiffs assert that the Crotti Court distinguished between "noise control measures that can be implemented on the ground" and such measures as "could require the banning or restricting of certain flights, . . ." Id, at p. 39. They assert that "the latter, even when implemented by the proprietor of an airport," are preempted. Ibid. The Crotti Court said nothing of the kind. The distinction, described above, was of quite a different sort. The statements at pp. 34-36 of Plaintiffs' memorandum are similarly out of context or inaccurate.[31]

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29. While declining to invalidate CNEL or any portion thereof on Airlines' motion for summary judgment, the Court held that factual issues arising thereunder must await a future day. Ibid.

30. The United States of America filed a brief amicus curiae in the Crotti case. Id., at 60. That brief was filed by the Department of Justice at the behest of both applicable agencies, the Environmental Protection Agency and the Federal Aviation Agency Administration. The position taken by the United States was essentially that adopted by the Court: That SENEL was pre-empted and that CNEL was not.

31. Opinion of the Justices, 359 Mass. 778, 271 N.E.2d 354 (1971), also cited by plaintiff, is irrelevant. The action proposed was straight police power—not the action of a proprietor.

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ii. National Aviation v. City of Hayward.

The most recent pertinent decision is National Aviation, et al. v. City of Hayward, supra, ___F.Supp.___, No. C-75-2279 RFP (N.D. Cal., filed July 13, 1976, attached as Appendix 1). The Hayward City ordinance "enacted on October 14, 1975, pursuant to defendant Hayward's capacity as proprietor of the Hayward Air Terminal, prohibits all aircrafts which exceed a noise level of 75 dBA from landing or taking off from the Hayward Air Terminal between the hours of 11:00 p.m. and 7:00 a.m. [Footnote omitted.]" Id., slip opinion, p.1.

The Court turned to Burbank and fixed on Secretary Boyd's letter (Appendix 2) as a "critical piece of legislative history upon which the Burbank opinion turned. . . ." Id., p.6. After quoting the letter the National Aviation court concluded "Accordingly, the Burbank court's finding of preemption was made only with regard to a nonproprietor municipality's attempt to regulate aircraft noise pursuant to its police power." Id., p.7. Deciding that the ordinance with its attendant criminal penalty were enacted by a state or local government other than the proprietor, it would run afoul of Burbank (id., pp. 7-8), the court went on to conclude that the city as proprietor could enact such an ordinance.[32] Id., pp. 8-16.

In its thoughtful analysis the District Court in National Aviation noted the conflict between some of the rationale of Burbank and the "clear Congressional intention that airport proprietors continue to be permitted to deny the use of their airports to aircraft on the basis of noise considerations so

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32. The court in National Aviation, by upholding a criminal ordinance imposed by a proprietor, went considerably farther than this Court need go to uphold the actions of the proprietor under review.

long as such exclusion was nondiscriminatory." Id., p. 12; see p. 13. The Court concluded:

> "In the opinion of this court, it is ultimately this clear expression of legislative intent which must control our decision, for, to echo the analysis of Justice Douglas, when 'Congress legislate[s] in a field which the States have traditionally occupied, . . . [the] powers of the States [are] not to be super-ceded by the Federal Act unless that [is] the clear and manifest purpose of Congress. . . .' Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947). Accordingly, while the Congressional purpose was undoubtedly clear enough to the Burbank majority to rule that a municipality's police power regulations regarding aircraft noise at an airport, which it was not the proprietor of, invaded an area exclusively reserved for federal control, [footnote omitted] this court cannot, in light of the clear Congressional statement that the amendments to the Federal Aviation Act were not designed to and would not 'prevent airport proprietors from excluding any aircraft on the basis of noise considerations,' [footnote omitted] make the same finding with respect to regulations adopted by municipal airport proprietors. If Justice Douglas' comments regarding the need for an 'uniform and exclusive system of federal regulation' prove correct, Congress and the FAA can take the appropriate steps to provide such a regulatory system. [Footnote omitted.] However, at the present time, Congress and the FAA do not appear to have preempted the area, and therefore, the City of Hayward, as proprietor of Hayward Air Terminal, cannot be enjoined from enforcing ordinance 75-023 C.S. on preemption grounds. [Footnote omitted.]" Id., at pp. 13-15.

## III. THE EXISTING SYSTEM OF AIRPORT REGULATION IS IN FACT ONE OF "PERVASIVE DIVERSITY," NECESSITATED BY THE REQUIREMENTS OF INDIVIDUAL AIRPORTS AND THEIR SURROUNDING COMMUNITIES.

### A. Airport and Surrounding Land Use Management, Unlike Airspace Management, Is and Must Be One of "Pervasive Diversity".

Justice Douglas, in speaking for the majority in Burbank opened his opinion by quoting Justice Curtis in Cooley v. Board of Wardens, 12 How. 299 (1851), to contrast those aspects of commerce "'imperatively demanding a single uniform rule'"

(such in Burbank as aircraft in managed airspace) with those aspects of commerce "'imperatively demanding that diversity, which alone can meet the local necessities of navigation'" (such as ports). Burbank v. Lockheed, supra, at 625. The airports of today, like the ports of 1851, fall into the second category, and that their management in fact and by necessity imperatively demands regulation "not by one system, or plan of regulations, but by as many as the legislative discretion of the several states should deem applicable to the local peculiarities of the ports within their limits." Cooley v. Board of Wardens, supra, at 319. "[T]he nature of the subject when examined, is such as to leave no doubt as to the superior fitness and propriety, not to say the absolute necessity, of different systems of regulation, drawn from local knowledge and experience, and conformed to local wants." Ibid. As is case with airports, the Supreme Court in Cooley found the nature of port regulation, "not only does not require such exclusive regulation, but may be best provided for by many different systems enacted by the states, in conformity with the circumstances of the ports within their limits." Id., at 319-320.[33/]

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33. The analogy of the old port to the new airport is not a novel one. After discussing the growth of aviation then Chief Judge Cardozo termed airports the "ports for the new traffic. . . ." Hesse v. Rath, 164 N.E. 342 (Ct. of App. N.Y. 1928). While the laying out of airways was seen as an appropriate federal function, the "maintenance of airports. . . comes legitimately within the scope of the municipality in much the same manner as docks and harbor facilities for marine shipping." Wichita v. Clapp, 263 Pac. 12, 15 (S.C. Kans. 1928).

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As Lyman Tondel, national legal spokesman for the Air Transport Association,[34/] has said:

> "Every runway approach area in the country is different, not just topographically but also in residential history, in its local government, in its zoning laws, in its ambient noise, in its leadership, in its economic status, and in the ability and willingness of its residents to adjust to nearby airport operations." Lyman M. Tondel, Jr., "Noise Litigation at Public Airports," in Alleviation of Jet Aircraft Noise, U.S. Office of Science and Technology, March, 1966, 119.

As the Air Transport Association has recently asserted, "Every airport and every airport location, as well as its neighborhood is unique. Each airport's operations, each airport's surroundings, and each airport's role in its community is different; . . ." (Emphasis in the original.) E.P.A., Legal and Institutional Analysis, Appendix B, Formal Recommendations of Task Group Member Organizations, Air Transport Association, Formal Position, p. 7.

### B. The Actual Practice of Airports Is One of Noise Limitations Attuned to The Requirements of Individual Airports

So as not unduly to lengthen this brief we have attached as Appendix 3 a Memorandum Summarizing Noise Restrictions in Effect at Airports Throughout the World. This in turn is authenticated by the affidavit which appears as Appendix 4.

We trust the recitation of these regulations will serve to emphasize the "pervasive diversity" of airport noise regulations throughout the world.

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34. U. S. Environmental Protection Agency, Legal and Institutional Analysis of Aircraft and Airport Noise and Apportionment of Authority Between Federal, State, and Local Governments (1973) at p. A-2. Though the EPA task group reports do not necessarily represent the official EPA view, the EPA report to Congress required by the Noise Control Act (42 U.S.C. § 4906) was itself based on the reports of the six task groups. See EPA, Report on Aircraft-Airport Noise (1973) at 9-11.

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## CONCLUSION

To borrow from the reasoning of the most recent court to pass upon the issue now before this Court, Plaintiffs' argument "makes sense only if one denies the existence of the airport owner exception, which so clearly appears in the legislative history and the case law." National Aviation v. City of Hayward, supra, ___ F.Supp. ___ (N.D. Cal., filed July 13, 1976) slip opinion, p. 11.

The authority to control aircraft noise flows from property rights in the airports and the attendant responsibility and liability for that noise. Simply stated, under American law, as a concomitant of being liable for aircraft noise, the airport proprietor may control it. Plaintiff Airlines propose no assumption of defendant airport's liability, but they vigorously attempt to terminate the concomitant right of control. One can only marvel at their generosity with another's treasure. It is always easier to deplete an exchequer other than one's own.

Liability is the crux of this case. We respectfully suggest that in oral argument of this matter the Court pose one question to plaintiff airlines that goes to the heart of the issue:

> "If the SST were allowed to land at the Port Authority's airport, who do you propose should be liable for the noise it causes?"

The airlines can give one of three answers:

1. The Airlines. Neither the majority nor the minority in Griggs adopted this view. Nevertheless, one may query whether the airlines will voluntarily assume liability for noise as a concomitant of being permitted to make that noise.

2. The Federal Government. This was the view of the dissenters in Griggs. It is not the law of the United States. One may speculate whether the airlines are anxious to transfer

liability to the Federal Government. That government has shown itself singularly (and understandably) unwilling to assume that liability.

3. The Airport Proprietor. This was the view of the majority in Griggs. It is the law of the United States. That liability is premised on the proprietor's ability to diminish that liability by control of the noise.

Most respectfully, unless plaintiffs wish to contend to this Court that it should overrule the United States Supreme Court, the only legal answer to the above question is 3. That being the case, plaintiffs must lose this lawsuit and seek their remedy in either the Supreme Court (asking for a reversal of Griggs) or the Congress.

DATED: 8/13/76.

Respectfully submitted,

EVELLE J. YOUNGER
Attorney General

NICHOLAS C. YOST
Deputy Attorney General

Attorneys for State of California
Department of Transportation

NCY/my;ajs
8-11-76

MEMORANDUM SUMMARIZING NOISE RESTRICTIONS IN EFFECT AT AIRPORTS THROUGHOUT THE WORLD

As shown in the attached Affidavit of Nicholas C. Yost based on documents discussed in Air Transport Ass'n. v. Crotti, supra, there are in fact pervasive noise restrictions at airports throughout the world.

Noise restrictions a/ are imposed at the following airports served by airlines b/ which are plaintiffs in Air Transport Ass'n. v. Crotti:

A. Domestic: Albany County Airport, Albany, New York; New Mexico International Airpot, Albuquerque, New Mexico; Anchorage International Airport, Anchorage, Alaska; Atlana International Airport, Atlanta, Georgia; Meadows Airport, Bakersfield, California; Boise Air Terminal, Boise, Idaho; Logan International Airport, Boston, Massachusetts; Greater Buffalo International, Buffalo, New York; Hollywood-Burbank, Burbank, California; O'Hare International Airport, Chicago, Illinois; Cleveland-Hopkins International Airport, Cleveland, Ohio; Dallas Love Field, Dallas, Texas; Denver Stapleton International Airport, Denver, Colorado; Detroit Wayne County Metropolitan Airport, Detroit, Michigan; El Paso International Airport, El Paso, Texas; Mahlon Sweet Airport, Eugene, Oregon; Fresno Air Terminal, Fresno, California; Great Falls International, Great Falls, Montana; General Lyman Airport, Hilo, Hawaii; Honolulu International Airport, Honolulu, Hawaii; Fanning Airport, Idaho Falls, Idaho;

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a. "Noise restrictions" is here defined as including such restrictions of any sort whatsoever including but not limited to restrictions on times of operations, restrictions on the amount of noice produced, restrictions on altitudes, runway preference procedures, restrictions on methods of takeoffs or landings, and restrictions on types of aircraft that may use the airport.

b. This list is not an inclusive list of airports

Kingsley Airport, Klamath Falls, Oregon; McCarran International, Las Vagas, Nevada; Nez Perce County, Lewiston, Idaho; Los Angeles International Airport, Los Angeles, California; Long Beach Municipal Airport, Long Beach, California; Jackson County, Medford, Oregon; Miami International, Miami, Florida; General Mitchell Field, Milwaukee, Wisconsin; Minneapolis/St. Paul International Airport, Minneapolis, Minnesota; Monterey Peninsula, Monterey, California; Newark International Airport, Newark, New Jersey; Moisant International Airport, New Orleans, Louisiana; John F. Kennedy International Airport, New York, New York; LaGuardia Airport, New York, New York; Will Rogers Airport, Oklahoma City, Oklahoma; Palmdale (Plant 42), Palmdale, California; Palm Springs Municipal, Palm Springs, California; Philadelphia International Airport, Philadelphia, Pennyslvania; Sky Harbor Airport, Phoenix, Arizona; Pocatello Municipal, Pocatello, Idaho; Portland International Airport, Portland, Oregon; T. F. Green State Airport, Providence, Rhode Island; Roberts Airport, Redmond, Oregon; Reno International Airport, Reno, Nevada; Byrd International Airport, Richmond, Virginia; Rochester Monroe County Airport, Rochester, New York; Sacramento Metro, Sacramento, California; Salt Lake City International Airport, Salt Lake City, Utah; San Antonio International Airport, San Antonio, Texas; Lindbergh Field, San Diego, California; San Francisco International Airport, San Francisco, California; San Jose Municipal, San Jose, California; Santa Barbara Municipal, Santa Barbara, California; Santa Maria Public, Santa Maria, California; Seattle Tacoma International Airport, Seattle, Washington; Sioux Falls Foss Field, Sioux Falls, South Dakota; Spokane International Airport, Spokane, Washington; Stockton Metro Airport, Stockton, California; Tampa International Airport, Tampa, Florida; Tucson International,

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with noice restrictions. It only applies to airports which happen to be used by the airlines which are plaintiffs in the Crotti case.

Tucson, Arizona; Walla Walla County, Walla Walla, Washington; Washington National Airport, Washington, D.C.; Yakima Municipal, Yakima, Washington; Yuma International, Yuma, Arizona.

B. Foreign: Schipol Airport, Amsterdam, Holland; Athens, Greece; Auckland International Airport, Auckland, New Zealand; Seawell International Airport, Bridgetown, Barbados; Tegel & Tempelhof Airports, Berlin, Germany; Brussels Airport, Brussels, Belgium; Calgary International Airport, Calgary, Canada; Cologne-Bonn Airport, Cologne, Germany; Kastrup Airport, Copenhagen, Denmark; Dusseldorf Airport, Dusseldorf, Germany; Lamentin Airport, Fort de France, Martinique; Edmonton International Airport, Edmonton, Alberta, Canada; Rhine/Main Airport, Frankfurt, Germany; Cointrin Airport, Geneva, Switzerland; Hamburg Airport, Hamburg, Germany; Hongkong; Hannover Airport, Hannover, Germany; Karachi Airport, Karachi, Pakistan; Libreville, Gabon; Aerodrom Lisbon, Lisbon, Portugal; Heathrow Airport, London, England; Luxembourg, Belgium; Madrid-Barajas Airport, Madrid, Spain; Melbourne Aero and Melbourne/Essendon Airports, Melbourne, Australia; International Airport, Mexico City, Mexico; Sangster International Airport, Montego Bay, Jamaica; Montral International Airport, Montreal, Quebec; Munich Airport, Munich, Germany; Cote D'Azur Airport, Nice, France; Nuremberg Airport, Nuremberg, Germany; Osaka International Airport, Osaka, Japan; Fornebu Airport, Olso, Norway; Ottawa International Airport, Ottawa, Ontario, Canada; Orly Airport, Paris, France; Prestwick Airport, Prestwick, U. K. Scotland; Fiumicino Airport, Rome, Italy; Truman Airport, St. Thomas, Virgin Islands; Ensheim Airport, Saarbrucken, Germany; San Juan, Puerto Rico; Shannon Field, Shannon, Ireland; Arlanda Airport, Stockholm, Sweden; Stuttgart Airport, Stuttgart, Germany; Kingsford-Smith Airport, Sydney, Australia; FAAA Airport, Tahiti; Mehrabad Airport, Tehran, Iran; Aerodrome, Tel Aviv, Israel; Tokyo International Airport, Tokyo, Japan; Toronto International

Airport, Toronto, Ontario; Vancouver International Airport, Vancouver, British Columbia; Whitehorse, Yukon Territory; Winnipeg International Airport, Winnipeg, Manitoba; Kloten Airport, Zurich, Switzerland. (Attachment "A" to Plaintiffs' Answers to First Interrogatories of Defendant J. R. Crotti (hereinafter referred to as "Interrogatories") attached to affidavit of Yost.

C. Types Of Noise Restrictions at Foreign Airports

By way of example, the variety of types of noise restrictions at various foreign airports are illustrated by those with which one of airlines plaintiff Crotti complies. Pan American encounters and complies with a variety of noise restrictions at the various airports served by that carrier. These include:

1. Preferred runway restrictions at the following airports: Schipol, Amsterdam, Netherlands; International, Auckland, New Zealand; Brussels, Belguim; O'Hare, Chicago, Illinois; Kastrup, Copenhagen, Denmark; Dusseldorf, Germany; Frankfurt/Main, Frankfurt, Germany; Hamburg, Germany; Hannover, Germany; Heathrow, London, United Kingdom; Melbourne Aero, Melbourne, Australia; International, Mexico City, Mexico; International, Miami, Florida; Munich, Germany; International, New Orleans, Louisiana; International, New York; Nuremberg, Germany; Fornebu, Oslo, Norway; Orly, Paris, France; International, Tampa, Florida; International, Tokyo, Japan; Kingsford-Smith, Sydney, Australia.

2. Hours of Operation at the following airports: Tegel, Berlin; Tempelhof, Berlin; Cologne-Bonn, Cologne, Germany; Dusseldorf, Germany; Frankfurt/Main, Frankfurt, Germany; Hamburg, Germany; Hannover, Germany; Heathrow, London, United Kingdom; Melbourne Aero, Australia; Munich, Germany; International, New York; Cote D'Azur, Nice, France; International, Osaka, Japan; Fornebu, Oslo, Norway; Orly, Paris, France; Ensheim, Saarbrucken, Germany; Stuttgart, Germany; International, Tokyo, Japan;

Kingsford-Smith, Sydney, Australia.

3. Departure Procedure at the following airports: Schipol, Amsterdam, Netherlands; International, Auckland, New Zealand; Tegel, Berlin; Seawell, Bridgetown, Barbados Island; Brussels, Belgium; O'Hare, Chicago, Illinois; Cologne-Bonn, Cologne, Germany; Kastrup, Copenhagen, Denmark; Metropolitan, Detroit, Michigan; Dusseldorf, Germany; Lamentin, Ft. de France, Martinique Island; Frankfurt/Main, Frankfurt, Germany; Hamburg, Germany; Hannover, Germany; Karachi, Pakistan; Leon M'ba, Libreville, Gabon; Heathrow, London, United Kingdom; International, Los Angeles, California; Melbourne Aero, Australia; International, Miami, Florida; International, Montego Bay, Jamaica; Munich, Germany; International, New Orleans, Louisiana; International, New York; Cote D'Azur, Nice, France; Nuremberg, Germany; International, Osaka, Japan; Fornebu, Oslo, Norway; Orly, Paris, France; International, Philadelphia, Pennyslvania; Prestwick, United Kingdom; Fiumicino, Rome, Italy; Ensheim, Saarbrucken, Germany; Truman Airport, St. Thomas, Virgin Islands; International, San Francisco, California; Tacoma, Seattle, Washington; Arlanda, Stockholm, Sweden; Suttgart, Germany; FAAA, Tahiti, Society Islands; International, Tampa, Florida; Mehrabad, Tehran, Iran; International, Tokyo, Japan; Kingsford-Smith, Sydney, Australia.

4. Arrival Procedure at the following airports: Schipol, Amsterdam, Netherlands; Seawell, Bridgetown, Barbados Islands; Brussels, Belgium; O'Hare, Chicago, Illinois; Cologne-Bonn, Cologne, Germany; Metropolitan, Detroit, Michigan; Frankfurt/Main, Germany; Hamburg, Germany; Leon M'ba, Libreville, Gabon; Heathrow, London, United Kingdom; International, Los Angeles, California; Melbourne Aero, Australia; International, New Orleans, Louisiana; International, New York; Cote D'Azur, Nice, France; International, Osaka, Japan; Fornebu, Oslo, Norway; Orly,

Paris, France; Prestwick, United Kingdom; International, San Francisco, California; Tacoma, Seattle, Washington; FAAA, Tahiti, Society Islands; Mehrabad, Tehran, Iran; International, Tokyo, Japan; Kingsford-Smith, Sydney, Australia.

5. Noise Limits at the following airports: Kastrup, Copenhagen, Denmark; Dusseldorf, Germany; Heathrow, London, United Kingdom; International, New York; International, Osaka, Japan; Fornebu, Oslo, Norway.

6. Reverse Thrust Restriction at the following airports: Cologne-Bonn, Germany; Kastrup, Copenhagen, Denmark; Dusseldorf, Germany; Frankfurt/Main, Germany; Hannover, Germany; Munich, Germany; Stuttgart, Germany.

7. Engine Run-up Restriction at the following airports: Tempelhof, Berlin. Affidavit of Yost, Exhibit "A".

The list of curfews at foreign airports served by another plaintiff, TWA, further illustrates the noise restrictions with which plaintiffs in fact comply. London's Heathrow Airport permits no scheduled takeoffs between 11:30 p.m. and 6 a.m. Frankfurt Airport bans scheduled landings between midnight and 5 a.m. Paris' Orly Airport permits no scheduled landings or takeoffs between 11:30 p.m. and 6:15 a.m. Geneva permits no scheduled landings between midnight and 5 a.m. It permits no takeoffs between midnight and 6 a.m. Zurich imposes the same restrictions as Geneva. Okinawa's airport is closed from midnight until 6 a.m. The Hong Kong Airport permits no landings or takeoffs between midnight and 8 a.m. Affidavit of Yost, Exhibit "B".

D. Examples of Noise Restrictions

We now proceed, by way of example, to discuss in greater detail the noise restrictions in effect at various foreign airports with which airlines which we plaintiffs in Crotti in fact comply.

1. Noise Restrictions At Foreign Airports

Noise abatement procedures are in effect at major airports in the home country of the two non-United States carriers which are plaintiffs in Crotti.

At Montreal International Airport for takeoffs there is a system of preferred runways; a take-off profile (mandating certain climb techniques until a given altitude) is imposed; and a take-off routing is required (by which the aircraft must climb at or turn to a given compass heading at certain points). On landing there exist preferred runways, a landing routing, and directions regarding the height at which the aircraft is to be at given times and the angle at which the aircraft is to approach. Noise limits of 112 PNdB are imposed. A night-time curfew is imposed. No takeoffs or landings are permitted between midnight and 7 a.m. (with exceptions for certain previously permitted delayed and unscheduled traffic). Ground running is prohibited between midhight and 7 a.m. (with exceptions for certain idle run-ups with prior clearance). Yost Affidavit, Exhibit "C", attachment 1.

At Toronto International there are also in effect similar restrictions on takeoff and landing procedures. Noise limits of 112 PNdB are also imposed. A curfew is imposed from midnight to 7 a.m. for scheduled traffic and from 11 p.m. to 7 a.m. for charter operations and technical stops. Exceptions are provided for delayed traffic. c/ Yost Affidavit, Exhibit "C", attachment 3.

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c. The evidence provided by plaintiffs in Crotti in response to interrogatories is not completely consistent as to the nature of the curfew imposed at Toronto. Another document provided by plaintiffs concerning the same airport states that Toronto International Airport does not permit the introduction of new scheduled flights using turbo-jet aircraft between the hours of midnight and 7 a.m. Furthermore, turbo-jet aircraft may not use that airport between the hours of 11 p.m. and 7 a.m. for charter operations or technical stops. Yost Affidavit, Exhibit "D".

At Ottawa International Airport similar takeoff and landing procedures are in effect. A night curfew on training flights is imposed, and no such flights are permitted on Sunday. Yost Affidavit, Exhibit "C", attachment 2.

Typical of takeoff procedures required for noise abatement purposes is that at Calgary International Airport, Calgary, Alberta, Canada. Air Canada's Route Manual, which is provided to its pilots, specifies that after taking off from certain runways aircraft are to climb at a certain heading to a stated altitude before being permitted to turn. Yost Affidavit, Exhibit "E".

At Kastrup Airport, Copenhagen, Denmark (served by plaintiffs' Air Canada and Pan American) limits of 110 PNdB are imposed upon aircraft. Yost Affidavit, Exhibit "C", attachment 4.

Heathrow Airport, London, England, imposes the following maximum permissible noise limits: 110 PNdB during days (7 a.m. to 11 p.m.) and 102 PNdB at nights (11 p.m. to 7 a.m.). Yost Affidavit, Exhibit "F". By way of example, plaintiff Air Canada furnishes its pilots with charts whereby given the type aircraft and the temperature, the pilot will know the maximum takeoff weight permissible. Air Canada's instructions to its pilots further calculate the time in seconds from each runway to each monitoring site and direct the pilots to reduce power ten seconds prior to passing over the noise monitoring sites. d/ Appropriate instructions are also given for noise abatement arrivals at the airport. Yost Affidavit, Exhibit "F".

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d. For instance, times are listed on the table for the DC 8 aircraft (varying between 1 minute, 4 seconds, and 2 minutes, 30 seconds) for different runways and standard instrument departures (SIDs). The instructions specify: "Times listed in the tables are based on . . . ten seconds less than the calculated times to the respective noise monitoring sites and are the times at which power reduction should be commenced". Yost Affidavit, Exhibit "F".

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At Nice, France, takeoffs and landings are prohibited between 11 p.m. and 6 a.m. (exceptions may be made on request for the takeoff of a delayed flight). Yost Affidavit, Exhibit "C", attachment 5.

At Le Bourget Airport, Paris, France, takeoffs and landings are banned between 10:15 p.m. and 6 a.m. (with specified exceptions). Ground running is prohibited absent a noise suppressor of a type approved by Aeroport de Paris. Reverse thrust is forbidden from 10:15 p.m. to 6 a.m., except in emergencies. Yost Affidavit, Exhibit "C", attachment 6.

At Orly Airport, Paris, France, a curfew on takeoffs and landings is imposed from 11:30 to 6 a.m. Ground running is prohibited except for certain short runs or if using a noise suppressor of a type approved by Aeroport de Paris. Reverse thrust is forbidden from 10:15 p.m. to 6 a.m., except for emergencies. Yost Affidavit, Exhibit "C", attachment 7.

Restrictions are imposed at Dusseldorf Airport, Dusseldorf, Germany. Landings by jet aircraft at night are generally prohibited. (Exceptions are made for certain delayed aircraft, for emergency situations, for disaster missions, and for maintenance.) On request aircraft which "probably do not exceed the maximum noise levels published in ICAO Annex 16" e/ may be given a permanent exceptional landing permission until 11 p.m. (rather than 10 p.m.). Ground running is generally forbidden except with noise suppression devices or upon special permission.

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e. ICAO Annex 16 refers to noise-type specification requirements recommended by the International Civil Aviation Organization (of which the United States is a member), which are similar in concept (but not identical) to the FAA's Part 36 type certification levels.

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Reverse thrust is not to be used between 11 p.m. and 5 a.m. by jet and turbo prop aircraft except for safety reasons. At Dusseldorf noise recordings are made but no maximum noise limit has as yet been established. Yost Affidavit, Exhibit "C", attachment 11; Exhibit H.

Both Tegel and Tempelhof Airports, Berlin, Germany, ban flights between 11 p.m. and 5 a.m. with exceptions for certain inadvertently delayed flights. Yost Affidavit, Exhibit "C", attachments 8 and 9. Bremen Airport in Germany has a partial curfew. It is operational from 5:30 a.m. until 10:00 p.m. At other times prior permission of the airport operator is required. Exceptions include scheduled airline operations, diversion landings, and emergency landings. Yost Affidavit, Exhibit "C", attachment 10.

At Frankfurt, Germany, there are minimum noise routes for the aircraft to follow. Culpable originators of excessive noise who have violated the regulations regarding take-off and landing procedures may incur fines up to DM 5000. The maximum noise limits are not officially promulgated. However, they vary from 77 dBA to 82 dBA, depending on the location of different noise measuring points. The monitoring devices are intended to control adherence to minimum noise routings. A curfew is imposed for landings and takeoffs for scheduled airlines while a longer such curfew is required for check, test, ferry, training, and charter flights. Certain exceptions are provided. There are restrictions on ground running and reverse thrust is forbidden at night unless unavoidable for reasons of safety. Yost Affidavit, Exhibit "C", attachment 12.

At the Kohn/Bonn Airport in Germany certain runways may not be used for jet take-offs and landings at night. No repeated approaches for training purposes may be made at night. Ground

running is forbidden unless noise suppression devices are used or with special permission. Yost Affidavit, Exhibit "C", attachment 13.

At Germany's Hannover Airport night-time takeoffs are limited to aircraft of scheduled air services and for delayed aircraft of touristic traffic. No night training or check flights are permitted. At night aircraft operators may not employ reverse thrust except for reasons of safety. Yost Affidavit, Exhibit "C", attachment 14.

At Munich, Germany, there is a partial curfew with exceptions which include aircraft in scheduled air services, for propellor driven craft, and for aircraft whose operators have their main maintenance facilities at the airport. On weekends and holidays aircraft are prohibited from repeated successive approaches and departures of the same aircraft. Training and exercise flights are forbidden at night. Ground running and reverse thrust are generally prohibited during the night hours. Yost Affidavit, Exhibit "C", attachment 15.

Nurnberg, Germany, imposes a curfew on takeoffs and landings with prior permission needed from the airport operator for exceptions. A similar curfew is in effect at Saarbrucken-Ensheim, Germany. Yost Affidavit, Exhibit "C", attachments 16 and 17.

At Stuttgart, Germany, there is a complete night-time curfew, except that the curfew hours for scheduled aircraft service are somewhat shorter. Ground running requires prior permission, and reverse thrust is banned at night, except when unavoidable for safety reasons. Yost Affidavit, Exhibit "C", attachment 18.

At Osaka, Japan, noise limits are imposed on takeoffs and landings in three stages. A night-time limit of 75 dBA is



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imposed; an early morning and evening limit of 100 dBA is imposed; and a regular day-time limit of 107 dBA is in effect. A general curfew is in effect except for aircraft for the exclusive use of postal service and emergencies or specified "unavoidable situations". Yost Affidavit, Exhibit "C", attachment 19.

Another such curfew is that imposed at Tokyo International Airport. Jet take-offs and landings are prohibited at night except "in an emergency or unavoidable situation", which term is then defined in some detail, ranging from an "abnormal situation" among crew or passengers to "typhoon evacuation". Yost Affidavit, Exhibit "G".

At Schipol Airport, Amsterdam, The Netherlands, there are in effect noise restrictions with similarities to those imposed by the proprietor of Los Angeles International Airport. A curfew from 11:30 p.m. to 6:00 a.m. is imposed except for one run-way and except for aircraft certificated per ICAO Annex 16. Ground running is prohibited at night, but exceptions may be granted with permission in the evening and early morning. Yost Affidavit, Exhibit "C", attachment 20.

Fornebu Airport, Oslo, Norway, imposes maximum noise limits of 112 PNdB. There is a curfew for all scheduled flights and a somewhat longer curfew for all night flights. Certain exceptions are provided for delays, safety, and in the early morning for quick turn around of charters. Yost Affidavit, Exhibit "C", attachment 21.

At Bromma Airport, Stockholm, Sweden, there is a curfew. No exceptions are provided. Yost Affidavit, Exhibit "C", attachment 22.

At Basle, Switzerland, takeoffs are banned from 11:00 p.m. until 5:00 a.m. while aircraft may not be landed between 11:00 p.m. and 4:00 a.m. Exceptions are made for delayed flights

(up to one-half hour) and for diversions due to technical or meteorological reasons. Yost Affidavit, Exhibit "C", attachment 23.

At Geneva/Cointrin Airport in Switzerland noise limits are imposed which vary between 92 and 95 dBA. A curfew is imposed on takeoffs from 11:00 p.m. until 5:00 a.m. and on landings from 11:00 p.m. until 4:00 a.m. Exceptions are made for delays up to one-half hour and for diversions due to technical or meterological reasons. Restrictions are placed upon both ground running and on the use of reverse thrust. Yost Affidavit, Exhibit "C", attachment 24.

At Zurich, Switzerland, the noise limits imposed vary between 90 and 105 dBA at varying positions with lower night limits running as low as 86 dBA. Takeoffs are prohibited between 11:00 p.m. and 5:00 a.m. Landings are banned between 11:00 p.m. and 4:00 a.m. Exceptions are made for delayed flights up to one-half hour and for diversions due to technical or meterological reasons. Restrictions are also placed upon both ground running and reverse thrust. Yost Affidavit, Exhibit "C", attachment 25.

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